IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1307

STATE OF MINNESOTA; COUNTY OF CLEARWATER, A MUNICIPAL CORPORATION; EUGENE STEVENS AND LAURIE STEVENS, *Petitioners,*

v.

ZAY ZAH, CHARLES AUBID, GEORGE G. AUBID, SR., A. J. POWERS, LUELLA POWERS, GORUM RICHARD POWERS, ANNIE DAVIS, MARY SHINGOBE FORMERLY MARY DAVIS, HENRY DAVIS, JOHN DAVIS, JIM DAVIS, FRANK BENJAMIN, JOE BENJAMIN, MAGGIE BENJAMIN, NE SHO GAH BOW E QUAY, AND ALSO ALL OTHER PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE LANDS DESCRIBED IN THE COMPLAINT HEREIN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The State of Minnesota, County of Clearwater, a municipal corporation, Eugene Stevens and Laurie Stevens petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Minnesota.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court reported at 259 N.W. 2d 580, is set out in Appendix A, *infra*. The opinion of the District Court, Ninth Judicial District, State of Minnesota (Appendix B, *infra*) is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota entered October 21, 1977, affirmed the order of the District Court of the Ninth Judicial District of the State of Minnesota entered March 1, 1976. The Supreme Court of the State of Minnesota denied the motion of petitioners for a rehearing on November 17, 1977. On December 14, 1977, the enforcement of the judgment was stayed until February 16, 1978 and thereafter pending final determination of the case by this Court. A petition for extension of time for filing this Petition for Certiorari was granted by this Court on February 10, 1978, extending the time for filing until March 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

I. Whether the Clapp Amendment is improperly construed as limiting the power of Congress to remove restrictions as to sale, incumbrance or taxation for allotments of adult mixed-blood Chippewas received subsequent to the enactment of said amendment.

II. Whether adult mixed-blood allottees receiving allotments subsequent to the Clapp Amendment received said allotments in fee status even if Congress has limited power in removing restrictions as to taxation.

STATUTE INVOLVED

The statute at issue, the Clapp Amendment, Act of June 21, 1906, 34 Stat. 353 as amended 34 Stat. 1034 (1907), is as follows:

"That all restrictions as to the sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed-bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full-bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

STATEMENT

The Clapp Amendment, as passed in 1906 and amended in 1907, removed "all restrictions as to the sale, incumbrance, or taxation" for allotments held by mixed-blood Indians on the White Earth Reservation in Minnesota. It further declared that "the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple . . ." The tract of land in question is located in Clearwater County and was allotted in 1927 to a mixed-blood Chippewa, Zay Zah, also known as Charles Aubid, within the boundaries of the original White Earth Reservation. The petitioners, Eugene and Laurie Stevens, acquired title to this real estate by

purchase from the State of Minnesota in 1973, title having vested in the State on October 2, 1961, pursuant to a tax certificate of forfeiture. The courts below determined that Zay Zah (and therefore his sole heir, George Aubid, Sr.) owns equitable title in the land with the United States holding title in fee as trustee. This ruling is contrary to the plain wording of the Clapp Amendment, which by its own terms and consistent with Congressional intent, granted Zay Zah fee status in the allotment when he received it in 1927.

Zay Zah was allotted the land in question on September 6, 1927, twenty years after Congress had passed the Clapp Amendment. Consistent with that Amendment, the patent issued by the United States to Zay Zah was termed a "trust" patent. Zay Zah did not apply for a patent in fee simple for the real estate as he was permitted to do by the Clapp Amendment.

On September 11, 1940, a tax certificate of forfeiture was executed by the County, certifying that the time for redemption on the real estate for non-payment of taxes for the year 1931 had expired. An application for cancellation of the certificate of forfeiture was made by Zay Zah contending that the land could not be taxed while being held in "trust" by the United States. The County, believing that the twenty-five year tax immunity was effective, cancelled its certificate of forfeiture on January 30, 1947. Petitioners maintain that the County's cancellation of the certificate of forfeiture in 1947 was based on a misreading of the applicable law and a failure to distinguish between treatment of allotments, such as Zay Zah's, which had vested after passage of the Clapp Amendment and those which had vested prior to passage of the Amendment.

In 1954 real estate taxes were assessed on the land for that year and a real estate tax judgment was obtained in 1956. The time for redemption expired in 1961. A tax certificate of forfeiture was executed, thereby vesting title to the real estate in the State of Minnesota. On May 4, 1973, Eugene and Laurie Stevens, petitioners, received title to the real estate from the State of Minnesota.

On June 24, 1974, the petitioners filed a Summons and Complaint in the District Court, Ninth Judicial District, State of Minnesota, seeking to quiet title to the real estate. Answer and Counterclaim were filed by George G. Aubid, Sr. Trial was held on August 28, 1975. The matter was submitted on a Stipulation of Facts to the trial judge. On March 1, 1976, the District Court concluded that title was in George G. Aubid, Sr., with the United States as legal trustee under the "trust patent" issued in 1927 and recorded on August 18, 1941 in Clearwater County. The Minnesota Supreme Court affirmed the District Court's determination, relying heavily on a concession by counsel for the petitioners at oral argument that the land was not taxed during the twenty-five year period. The fact that the land had not been taxed was stipulated to, but no stipulation or concession was made that the County was correct in assuming that it did not have the authority to tax the land during the trust period.

The federal question was first raised in District Court by Defendants' Second Answer and Counterclaim, filed July 3, 1975, and Plaintiff's reply to Defendants' Counterclaim, filed August 8, 1975. At the appellate level the issue was included in Plaintiffs' Notice of Appeal to the Supreme Court of Minnesota, filed April 30, 1976.

The Clapp Amendment has been an issue throughout these proceedings and both courts below have interpreted this Act of Congress in making their determinations.

REASONS FOR GRANTING THE WRIT

I. The decision of the Minnesota Supreme Court turns the clear wording of the Clapp Amendment on its head and interprets it in a way contrary to both its clear language and the intent of Congress in passing it. The decision, if allowed to stand, will adversely affect not only the land in question in the present case, but also will cloud title to thousands of acres within the original boundaries of the White Earth Reservation which were allotted subsequent to passage of the Clapp Amendment.[1] The Minnesota District Court recognized that, as a consequence of its decision, "[n]umerous tracts of land on the White Earth Reservation now purportedly owned by persons who purchased tax deeds from the State of Minnesota will be affected by the within decision. . . ." (App. B, p. 51a). In addition, the decision below, if allowed to stand, will have a nationwide impact, since statutes similar to the Clapp Amendment were passed by Congress relative to various reservations throughout the country.[2]

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[1] *See, Mahnomen Pioneer,* Nov. 3, 1977, at 4, quoting Mark Anderson, attorney in the office of Elmer Nitzschke, Field Solicitor with the U.S. Dept. of Interior.

[2] *E.g.,* Acts of May 27, 1908, c. 199, sec. 4, 35 Stat. 312; May 10, 1928, c. 517, sec. 4, 45 Stat. 495; May 24, 1928, c. 733, 45 Stat. 733; August 17, 1949, c. 464, 63 Stat. 613.

II. Although the Clapp Amendment has been interpreted by many courts, including this Court, this is the first case to reach this Court in which the effect of the Clapp Amendment and the Indian Reorganization Act on allotments received by a mixed-blood Chippewa subsequent to the passage of the Clapp Amendment has been in issue. The dicta in this Court's opinions dealing with other issues raised by the Clapp Amendment, however, is contrary to the decision of the Minnesota Supreme Court.

The court below erroneously relied on prior decisions which dealt exclusively with the status of allotments issued prior to the enactment of the Clapp Amendment. *Mahnomen County* v. *U.S.,* 319 U.S. 474 (1943); *Morrow* v. *U.S.,* 243 F. 854 (8th Cir., 1917); *Warren* v. *County of Mahnomen,* 192 Minn. 464, 257 N.W. 77 (Minn., 1934). Since all of these cases dealt with allotments which had been issued in 1902, prior to passage of the Clapp Amendment, they are easily distinguishable from the situation where an allotment was received twenty years after passage of the Amendment as in this case. The lower courts, therefore, applied an inappropriate analysis in deciding this case.

When faced with the status of allotments received prior to the Clapp Amendment, the courts have consistently interpreted the Amendment as requiring consent by the allottee to the elimination of tax immunity, because of the underlying assumption that tax immunity is a vested property right which, once received, cannot be withdrawn unilaterally by act of Congress. Even assuming that such interpretation is a viable one,[3]

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[3] *See, U.S.* v. *First National Bank,* 234 U.S. 247, 259 (1914) (the Clapp Amendment "contains no provision that makes it effectual only upon consent of the Indians whose rights and privileges are to be affected.")

it has no application to the present case, where, by operation of the Clapp Amendment, tax immunity was never conferred, and therefore never vested in Zay Zah.

That vesting of rights in land occurs on delivery of the patent and embraces only those rights conferred by the patent was recognized in *Choate* v. *Trapp,* 224 U.S. 665 (1912), the initial case to characterize tax immunity as a "vested property right". The Supreme Court there specifically stated that, "[u]pon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent . . ." *Choate, supra* at 672.

A similar understanding was expressed in *Morrow* v. *U.S.,* 243 F. 854 (8th Cir., 1917), the case upon which the court below placed primary reliance. The court there noted that a vested right to tax immunity, like a contract right, is defined by the underlying agreement conferring that right, which, in the case of Indian allotments, is generally a statute or treaty. *Morrow, supra* at 856, 858. Applying the analysis to the facts of that case, the court in *Morrow* found that an allottee who received land *prior* to the Clapp Amendment did receive a vested right to tax immunity, because the Act pursuant to which the allotment had been issued—the Nelson Act, 25 Stat. 642, and the General Allotment Act, 24 Stat. 388 as amended at 34 Stat. 182—were agreements which conferred that right on the allottee. As was stated by the court,

> "That exemption of land from taxation is a property right is established. *Choate* v. *Trapp, supra.* That this Indian had taken possession of and was enjoying the land under such an exemption at the time the Clapp Amendment was passed is undisputed. Therefore, if this exemption came to him as a legal right, it had fully vested." *Morrow, supra* at 856.

By analogy to the present case, therefore, both *Choate* and *Morrow* require the conclusion that Zay Zah received the equivalent of fee simple title because his allotment was issued subsequent to the Clapp Amendment, which as the underlying "agreement", defined the nature of the rights conferred and explicitly removed all restrictions on the allotment received.

Further, the Clapp Amendment may at first seem to contain an internal redundancy; that is, that the "upon application" language might seem a superfluous addition to the statute if allottees receiving subsequent to the Clapp Amendment in fact received fee title. On closer examination, however, that language has been shown not to establish a blanket consent requirement, but to serve a distinct purpose consistent with the basic intent of the Clapp Amendment.

First, in dealing generally with the effect of the Clapp Amendment, this Court has stated that issuance of actual fee patent title, as provided for by the Clapp Amendment upon application by mixed-blood allottees, had as a result the complete emancipation of the allottee. *Dickson* v. *Luck Land Co.,* 242 U.S. 371 (1917), *U.S.* v. *Waller,* 243 U.S. 452 (1917). The Court in *Luck Land* reached this conclusion by reference to the provisions of the General Allotment Act, the statute which forms the contextual backdrop for the Clapp Amendment. The Court noted that the 1906 Amendment to that Act, 34 Stat. 182, "provides that when an Indian allottee is given a patent in fee for his allotment he 'shall have the benefit of and be subject to all

the laws, civil and criminal, of the state' ", thus equating issuance of the fee simple patent with total emancipation. *Luck Land, supra* at 375. This conclusion has been even more explicitly expressed by the Supreme Court of Minnesota, which has stated that, "We think it is the general view that issuance of a fee simple patent operates, by implication, to emancipate the Indian from federal guardianship and jurisdiction." *Baker* v. *McCarthy,* 145 Minn. 167, 170, 176 N.W. 643, 644 (1920). Clearly the provision for application is neither superfluous nor does it change the basic thrust of the Amendment to eliminate all restrictions on subsequent allotments. Rather, the provision for issuance of actual fee title was intended to echo the mechanism for emancipation of allottees provided by the General Allotment Act. The Congress that passed the Clapp Amendment was well aware of the effect of direct issuance of fee patent and the status regarding citizenship of the Indians who received such patents. (App. D, p. 72a)

A second interpretation of the application provision originates with the analysis that one purpose of the Clapp Amendment was to ensure both the ability of allottees to sell land and security of title to vendees. Thus, since what subsequent allottees received may have been, for administrative purposes, technically labelled a "trust patent", although entirely lacking any restriction on sale, incumbrances, or taxation, the Amendment made provision for issuance of actual fee patent title for the convenience of the allottee and any potential vendees. *Spaeth* v. *U.S.,* 24 F. Supp. 465, 469 (D. Minn. 1938). This interpretation is further strengthened by the Court's statement in *U.S.* v. *First National Bank,* 234 U.S. 247, 259 (1914), that the Clapp

Amendment "contemplated in some measure the rights of others who might deal with the Indians and obviously was intended to enlarge the right to acquire as well as to part with land held in trust for the Indians." *See also, U.S.* v. *Rickert,* 188 U.S. 432, 436 (1903) (term "patent" in Clapp Amendment denotes "instrument" only and does not define nature of land interest acquired); *U.S.* v. *Whitmire,* 236 F. 474, 480 (8th Cir., 1916) ("When the right to a patent has once become vested under the law, it is equivalent, so far as the government is concerned, to a patent actually issued.").

The court's conclusion in *Spaeth* is also supported by the legislative history of the Amendment itself, and similar provisions included in the general Appropriations Act. In the Senate debate of another amendment to the Indian Appropriations Act, the issuance of fee patents was suggested as a means of preventing "designing persons" from taking advantage of a situation in which some Indians (in this case, resident Kickapoos, App. D, pp. 73a, 74a) will have restrictions upon alienation removed and some will not. Without the issuance of fee patents to those whose restrictions were removed by the amendment, individuals not privy to who was a resident Kickapoo or a non-resident "would feel it impossible to get the right or proper title." Fee patents were viewed as a means of "protecting them further". However, Senator Clapp stated that there was no need for the fee patent to issue:

> "In regard to this matter of patent, I have had it brought up here two or three times in this bill where we remove restrictions. There is no objection to it, nor is there any earthly use in it. These Indians have already a deed called the 'trust deed'. We convert that into a patent by removing the restrictions, and it is purely surplusage to provide

for an additional patent when we remove all the restrictions that are contained in the existing instrument. There is no objection to putting it in if anybody desires it." 40 Cong. Rec. 5790-5791 (1906)

Four days later, when considering the Minnesota Tribes section of the Appropriations Act, Senator Clapp was once again asked about providing for patents in case of removing the restrictions on the White Earth Chippewa mixed-bloods' allotments, and replied as follows:

> Mr. Gallinger: I will ask the Senator, . . ., if, in removing these restrictions on allotments, as provided for in this amendment, there ought not to be a provision to issue patents in fee to these people?
>
> Mr. Clapp: That is a matter as to which I should have no objection one way or another. I will put in a provision to that effect if the Senator so desires.
>
> Mr. Gallinger: I should like to have the amendment amended in that particular.
>
> Mr. Clapp: That is, with the understanding that they have the right to patents.
>
> Mr. Gallinger: Precisely.
>
> Mr. Clapp: Not that it shall be discretionary.
>
> Mr. Gallinger: Oh no: but that they have the right to patents.
>
> Mr. Clapp: I will attend to that.

The clause, "or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments", was added to the Amendment *e* that point. 40 Cong. Rec. 5784 (1906)

Whichever of the two interpretations is ultimately determined to be the most viable one, it is clear that the "upon application" language was added to the Amendment to accomplish a purpose additional to the initial thrust of the Clapp Amendment, which was to effectively convey land in fee status to allottees receiving land subsequent to its passage. The Supreme Court of Minnesota, however, interpreted the Clapp Amendment in its entirety as requiring consent of allottees to removal of any restriction on the allotments, stating that, "[t]he Clapp Amendment is thus seen to have the effect of permitting Indians covered by its terms to convert their trust patents, whether issued before or after the passage of the Amendment, into fee simple titles subject to taxation. Nevertheless, once the trust patent has been issued, it cannot be so converted without the consent of the patentee." (App. A, p. 14a) This conclusion clearly contradicts statements in the various cases cited above, ignores the import of the legislative history, and reflects a novel and inconsistent interpretation of the Clapp Amendment.

In addition, the court below failed to adequately consider the plain meaning of the Amendment and tended to disregard Congressional intent at the time the Amendment was passed. The question of the intent of the Congress originally enacting the legislation is an important one in determining how courts should properly construe legislation years after its enactment.

Federal Indian policy shifted at the turn of the century from the promotion of separate sovereign tribes to the assimilation of individual Indians into the mainstream of American culture. The General Allotment

Act and the Nelson Act reflect the desire to reduce tribal land holdings to individual allotments in order to discourage a nomadic lifestyle among the Indian population and encourage instead the pursuit of agriculture.[4]

The assimilationist policy of Congress was still prevalent at the time of the enactment of the Clapp Amendment and is reflected in the debate on the Indian Appropriations Act of 1906. Even more significant for purposes of the present case, the floor debate on the Act indicates that granting land in fee status to individual Indians was considered an effective means of promoting assimilation. For example, Congressman Burke stated:

> "I believe that the tribal relations ought to be broken up, that as they become capable of managing their affairs the individual Indians should be allowed to have a fee simple patent to their lands, and if there are any moneys in the Treasury belonging to the tribe that they should be paid their pro rata share and be let go and in the future depend upon their own efforts for their livelihood and their success."
>
> 40 Cong. Rec. 3464 (1906)

Senator Clapp expressed a similar point of view before the United States Senate in 1907 when he stated:

> "The Constitution of the United States recognizes the capacity of the Indian to take care of his own affairs. It recognizes the Indians as consisting of nations, and authorizes the United States Government to make treaties with the Indians as nations. But after sitting down and solemnly making a treaty with them, upon the theory that they are competent to transact their affairs and that they are competent to enter into treaties, we turn around and assume the role of guardian and relegate them to the position of wards. It is an absolute travesty upon common justice and common honesty to have pursued that course toward the Indian. Either we should have regarded him as a ward, or, if we were right in recognizing his ability to transact his business in making treaties with him, then we should have recognized that relation . . ." 41 Cong. Rec. 2345 (1907).

[4] For a general discussion of the assimilationist policy, *See*, Cohen, Felix S. *Handbook of Federal Indian Law*, p. 206-217 (GPO, 1942).

The Clapp Amendment, by transforming trust lands into fee lands through the removal of restrictions, is thus clearly consistent with the contemporary Congressional goal of assimilating individual Indians into the surrounding non-Indian culture and is also consistent with Senator Clapp's strong feeling that the Indians were competent to transact their own affairs.

From the opinion below, it is evident that the court was attempting to "remake history", *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 615 (1977); had the court maintained the proper historical perspective, *see Rosebud, supra, Decoteau* v. *District County Court*, 420 U.S. 425 (1975), it would have concluded that the Clapp Amendment was given full effect—that is, resulted in removal of tax immunity—by those directly concerned with its application immediately upon its enactment.

The State of Minnesota began taxing Indian land allotments immediately after passage of the Clapp Amendment. (App. C, p. 54a, 55a, 56a, 64a, 66a, 67a, 71a) The Minnesota State Auditor, in a letter to the United States Indian Agent dated February 26, 1907,

cited the Clapp Amendment and stated, "[F]rom the above language it appears that all allotments of Mixed blood Indians on the White Earth Reservation are now subject to taxation". (App. C, p. 54a). C. F. Hauke, Second Assistant Commissioner of Indian Affairs, stated that lands of all adult mixed-blood Indians of the White Earth Reservation after passage of the Clapp Amendment "became taxable by the State authorities the same as the lands of any other citizen or resident of the State of Minnesota". (App. C, p. 64a). Consistent with this interpretation of the Amendment, the Department of the Interior authorized the use of tribal trust funds for payment of delinquent property taxes assessed on mixed-blood Indian allotments. (App. C, p. 57a, 61a, 62a, 63a, 68a, 69a, 70a) The primary concern of both the State of Minnesota and the Department of the Interior was in fact distinguishing between mixed-blood/taxable and full blood/nontaxable allottees. (App. C, p. 54a, 55a, 58a, 59a, 60a, 65a, 66a, 67a).

It is inappropriate for the courts to unilaterally attempt to alter the meaning of the Clapp Amendment through improper interpretation of its provisions. Because of current federal Indian policy, it may be understandable for courts to attempt to interpret past legislation with present perspectives. But, as was noted by this Court in *Rosebud, supra,* at 615:

> "Much has changed since then, and if Congress had it to do over again, it might well have chosen a different course. But, as we observed in *Decoteau* v. *District County Court,* 420 U.S. at 449, 'our task is a narrow one . . . (W)e cannot remake history.' "

III. Assuming *arguendo* that Zay Zah received a vested right to tax immunity in 1927, the effect of

the Clapp Amendment was nevertheless to grant Zay Zah land in fee status coupled with a right to tax immunity which expired in 1954.

This conclusion necessarily follows from a recognition of the fact that, even had Congress been unable to remove a right to tax immunity once vested, Congress' authority to remove restrictions on alienation and incumbrances was not similarly diminished. As was recognized in *Choate* v. *Trapp, supra,* which involved land held in fee status coupled with a right to tax immunity, restrictions on alienation and incumbrances are regarded as limitations, not rights, which can be removed by Congress unilaterally. *See also, Williams* v. *Johnson,* 239 U.S. 414, 420 (1915); *U.S.* v. *Benewah County,* 290 F. 628, 631 (9th Cir., 1923); *U.S.* v. *Ferry County,* 24 F. Supp. 399, 401 (E.D. Wash., 1938). Congress undoubtedly has the power to grant land in trust status with only limited restrictions, and has done so by various statutes, *e.g.,* Act of May 20, 1924, 43 Stat. 133, and the authority to define the exact nature of trust patent land is consistent with Congress' plenary powers in Indian affairs. *See, e.g., Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903).

The court below, however, linked trust status with tax immunity, improperly reasoning that possession of a limited right to tax immunity required the conclusion that Zay Zah held his land in trust status:

> "[T]here is simply no way to reconcile the granting of a fee simple via a trust patent with a vested right to tax immunity under that same patent." (App. A, p. 20a)

The court below further stated:

> "Logic would dictate that if Zay Zah received a fee simple in 1927 by reason of the Clapp Amend-

> ment, the land would have been subject to state taxation *ab initio*; but if Zay Zah had received a trust patent, meaning that the land was held by the Federal government in trust for him, it would not be subject to state taxation." (App. A, p. 9a)

In a footnote following this statement, the court perhaps inadvertently pointed out the basis of its own misconception. (App. A, p. 9a, 10a) The court characterized *Choate* v. *Trapp, supra*, as a case where Indians held "tax exempt lands under trust patents." But as discussed above, *Choate* in fact involved the prototype of situations where Indians held land in fee simple with an attendant right to tax immunity. The court below therefore proceeded on an improper interpretation of *Choate,* one of the leading cases to deal with the question involved in the present case.

Only one case discussed by the Minnesota Supreme Court, *Spaeth* v. *U.S.,* 24 F. Supp. 465 (D. Minn. 1938), deals with the effect of the Clapp Amendment on allotments received subsequent to its passage. (App. A, p. 17a-20a) Faced with deciding the effect of Executive Orders purporting to extend the duration of trust patents issued under the Clapp Amendment, the court in *Spaeth* concluded that, since restrictions on alienation had been removed by Congress through the Clapp Amendment, "(a) title tantamount to fee existed in the allottee," *Spaeth* at 469, and the Executive Orders could thus have no effect on allotments received after passage of the Amendment.

Because of the factual similarity between the two cases, the reasoning in *Spaeth* is clearly applicable to the present case, and requires the conclusion that, since Zay Zah received a "title tantamount to fee" in 1927,

the land was never held in trust status and the Indian Reorganization Act could have no effect on that allotment.

Application of the foregoing principles to the present case reveals that Zay Zah did not in fact receive an allotment in trust status in 1927. More specifically, the clear power of Congress to grant land with restrictions partially removed indicates that, by operation of the Clapp Amendment, Zay Zah in 1927 received the equivalent of fee simple title to his land, with an attendant right to tax immunity on that land for twenty-five years.

The court below, however, erroneously created an intractable relation between trust status and a right to tax immunity, concluding that the IRA operated to extend the period of trust status purportedly conferred on Zay Zah. As explained previously, however, Zay Zah actually received fee title to his land, with a right to tax immunity which expired in 1953. Therefore, the IRA could have no effect on Zay Zah's title, and the State of Minnesota properly foreclosed on the property for nonpayment of taxes in 1954.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1978

APPENDIX

APPENDICES

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APPENDIX A

Opinion of the Minnesota Supreme Court, 259 N.W. 2d 580 (1977)

STATE OF MINNESOTA, et al., Appellants,

v.

ZAY ZAH et al., Respondents,

A. J. POWERS, et al., Defendants.

No. 46834.

Supreme Court of Minnesota.

Oct. 21, 1977.

Rehearing Denied Nov. 17, 1977.

Action was brought to quiet title to real estate. The District Court, Clearwater County, John A. Spellacy, J., entered order for judgment in favor of defendant, and plaintiffs appealed. The Supreme Court, Scott, J., held that trusteeship agreement between mixed blood Chippewa Indian and United States concerning land location on White Earth Reservation did not terminate at end of 25-year initial term but was extended indefinitely by Wheeler-Howard Act that continued existing periods of trust upon Indian lands until otherwise directed by Congress; thus, tax-exempt status of land, derived from trust agreement, did not terminate at end of initial period, land did not become subject to forfeiture for nonpayment of taxes and equitable title remained in Indian and passed to his sole heir, with fee title remaining in United States unless and until holder of trust patent obtained a fee patent.

Affirmed.

Yetka, J., concurred specially and filed opinion.

1. TAXATION

Land may be exempt from property tax but not the individual who happens to own or possess land at any given time.

2. CONSTITUTIONAL LAW
TAXATION

Land held in trust by United States is exempt from state taxation during period of trusteeship and none of rights derived from trust can be divested without due process under Fifth Amendment. U.S.C.A. Const. Amend. 5; Act June 28, 1898, 30 Stat. 495.

3. TAXATION

Clapp Amendment permits Indians covered by its terms to convert their trust patents, whether issued before or after passage of amendment, into fee simple title subject to taxation, but, once trust patent has been issued, it cannot be so converted without consent of patentee and binding trust agreement continues in full effect, with its attendant tax exemption, until its term expires or patentee accepts title in fee simple. Act June 21, 1906, 34 Stat. 353.

4. TAXATION

Trusteeship agreement between mixed blood Chippewa Indian and United States concerning land located on White Earth Reservation did not terminate at end of 25-year initial term but was extended indefinitely by Wheeler-Howard Act that continued existing periods of trust upon Indian lands until otherwise directed by Congress; thus tax-exempt status of land did not terminate at end of initial period, land did not become subject to forfeiture for nonpayment of taxes and equitable title remained in Indian and passed to his sole heir, with fee title remaining in United States unless and until holder of trust patent obtained fee patent.

Wheeler-Howard Act, § 2, 25 U.S.C.A. § 462; Act June 21, 1906, 34 Stat. 353; U.S.C.A.Const. Amend. 5; Act June 28, 1898, 30 Stat. 495.

Syllabus by the Court

Land located on the White Earth Reservation allotted to an adult mixed-blood Chippewa Indian to be held in trust by the United States is exempt from state taxation during the period of that trusteeship and cannot become subject to forfeiture for nonpayment of state taxes. In such a case where it is undisputed that respondents took no action to convert the trust patent into a fee simple, or to alienate or encumber the land in any way, equitable title remained in the Indian patentee and passed to his heir. The tax certificate of forfeiture is therefore void under the specific facts of this case.

Aurel L. Ekvall, County Atty., Bagley, for appellants.

John M. Holmes, Indian Legal Assistance Program, Duluth, for respondents.

James W. Moorman, Acting Asst. Atty. Gen., Raymond N. Zagone, Edward J. Shawaker, Dept. of Justice, Washington, D.C., amicus curiae (seeking affirmance).

Tupper, Smith & Seck, Kent P. Tupper, Gerald L. Seck, Peter W. Cannon and Kimball D. Mattson, Walker (seeking affirmance), for Wh. Earth Res. Bus. Comm., amicus curiae.

George Goodwin, Bureau of Indian Affairs, Minneapolis, amicus curiae (seeking affirmance); Bernard P. Becker, St. Paul (of counsel).

Considered and decided by the court en banc.

SCOTT, Justice.

This is an appeal in an action to quiet title to real estate. Eugene and Laurie Stevens commenced the action in June

1974 in the district court of Clearwater County. In July 1974 the State of Minnesota and the County of Clearwater were joined as party plaintiffs. The matter was heard before the district court on August 28, 1975. On March 1, 1976, the court entered an order for judgment in favor of defendant George Aubid, Sr., the sole heir of defendant Zay Zah. Plaintiffs appeal from this judgment. We affirm.

This case was submitted to the district court upon a stipulation of the following facts:

"1. The following facts are admitted by both parties and shall be taken as true for the purposes of this action. No evidence of said facts other than this Stipulation need be adduced upon the trial.

"2. That the controversy herein relates only to the Northwest Quarter of the Southeast Quarter (NW ¼ SE ¼), Section Five (5), Township One Hundred Forty-four (144) North, Range Thirty-eight (38), West, Clearwater County, Minnesota, and that the parties hereto agree that said described real estate is located within the original boundaries of the White Earth Reservation in the State of Minnesota, and that the sovereignty of the United States extends over said described tract.

"3. [This paragraph was in dispute and was stricken by the district court by agreement of the parties.]

"4. That on September 6, 1927, the United States allotted unto Zay Zah, also known as Charles Aubid, one of the defendants herein, the above described real estate, declaring that the United States did hold and would hold said real estate thus allotted, subject to all statutory provisions and restrictions, for a period of twenty-five years in trust for the sole use and benefit of said Indian, and at the expiration of said period the United States would convey the same by patent to said Indian in fee, discharged of said trust and free from all

charge and encumbrance whatsoever, which trust patent was filed for record August 18, 1941, in Book 30 of Deeds, page 531 in the Office of the Register of Deeds, Clearwater County, Minnesota.

"5. That said Zay Zah, also known as Charles Aubid, did not at any time during his lifetime apply for a patent in fee simple to the above described real estate or convey the same.

"6. That on September 11, 1940, the Auditor for Clearwater County executed a tax certificate of forfeiture, certifying that the time for redemption of the above described real estate for nonpayment of taxes for the year 1931 had expired and that absolute title to said real estate thereby vested in the State of Minnesota and that said tax certificate of forfeiture was recorded in the office of the Register of Deeds, County of Clearwater, in Book I of Miscellaneous, page 602; and that an Application for Cancellation of said Certificate of Forfeiture for the reason that said real estate was held under a Trust Patent, the terms of which had not expired, and therefore tax exempt, was upon the recommendation of the County Board cancelled on January 30, 1947, as to the above described real estate, which certificate was registered in the office of the Register of Deeds, County of Clearwater, in Book K of Miscellaneous, page 246.

"7. That the County of Clearwater thereafter assessed real estate taxes upon the above described property for the year 1954, at which time the above described property appeared of record in the Office of the Register of Deeds of Clearwater County in the name of Zay Zah, who at that time was an adult mixed blood Chippewa Indian, and also known as Charles Aubid, one of the defendants herein.

"8. That in proceedings to enforce the payment of taxes claimed to be delinquent for the year 1954, the

County of Clearwater obtained a real estate tax judgment which was entered in the district court for said county on March 27, 1956; that on October 2, 1961, the auditor for the County of Clearwater executed a tax certificate of forfeiture, certifying that the time for redemption of said real estate had expired, and that absolute title to said real estate thereby vested in the State of Minnesota.

"9. That the Commissioner of Taxation for the State of Minnesota conveyed the above described real estate by Conveyance of Forfeited Lands, dated May 4, 1973, unto Eugene Stevens and Laurie Stevens, as joint tenants and not as tenants in common, their assigns, the survivor of said parties, and the heirs and assigns of the survivor, forever, excepting and reserving to the said state, in trust for the taxing districts concerned, all minerals and mineral rights, as provided by law, Eugene Stevens and Laurie Stevens to have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to said parties, their assigns, the survivor of said parties, and the heirs and assigns of the survivor, forever, said parties taking as joint tenants and not as tenants in common.

"10. That the pleadings herein set forth the claims of the parties herein and that to that extent only the same shall constitute a part of this stipulation.

"11. That the parties disagree as to which party, if any, is in possession of the real estate, but said issue shall not be submitted to the Court for determination for the reason that the issue is neither jurisdictional nor does it go to the merits of the controversy once the defendant has interposed his own prayer for affirmative relief.

"12. This Stipulation is for purposes of trial of the above entitled action only, and the matters contained

herein are not admitted for the purpose of any other trial or litigation.

"13. That Zay Zah, also known as Charles Aubid, is shown by the roll of the Chippewa Indians allotted within the White Earth Reservation in the State of Minnesota, prepared by the commission duly appointed under the Act of Congress of June 30, 1913, as amended by the Act of Congress on March 2, 1917, and that said roll shows as of the 1st day of October, 1920 that said Zay Zah was an adult mixed blood Indian.

"14. That the White Earth Reservation is a constituent element of the Minnesota Chippewa Tribe."

The district court concluded that the 1927 trust patent issued to Zay Zah continues in effect, thus making George G. Aubid, Sr., sole surviving heir of Zay Zah, the "sole beneficial owner and cestui que trust" of the disputed property.

We find the legal issue presented by these facts to be: Was the property in question subject to tax forfeiture following the expiration of the original trust patent, or did that patent remain in effect beyond the initial 25-year term?

The parties agree that during the original 25-year period of the trust patent given to Zay Zah in 1927, the property was not subject to state taxation. Appellants cite *United States v. Rickert*, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903), to this effect. Appellants and respondents assert different bases for this tax exemption, however. Appellants claim that the Clapp Amendment, discussed *infra*, eliminated the "trust" aspect of the patent, but could not divest the right not to be taxed during the duration of trust patent. This of course leads to the conclusion that taxation could begin when the 25 years expired. Respondents on the other hand, argue that the "trust status" of the allotment was in itself a constitutionally protected vested property right, thereby preventing taxation not only during the 25-year

period, but also thereafter by reason of indefinite extension of the "trust status" by the Wheeler-Howard Act of 1934. The pertinent part of that statute states:

> "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." 48 Stat. 984, 25 U.S.C.A., § 462.

Appellants' argument makes the Wheeler-Howard Act inapplicable because there would be no "trust" to continue following the 25-year period. The crux of the matter is therefore the relationship between the trust patent issued to Zay Zah in 1927 and the Clapp Amendment.

The trust patent contains the following relevant language:

> "Now Know Ye, that the United States of America, In consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever: but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian, and either issue to them in their names a patent in fee for said land or cause said land to be sold for the benefit of said heirs as provided by law."

The Clapp Amendment, dated June 21, 1906, 34 Stat. 353, reads in relevant part as follows:

> "That all restrictions as to the sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed-bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full-bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

A straightforward application of this statute would indicate that Zay Zah's trust patent in 1927 actually conveyed a fee simple, thus subjecting the property to taxation from the beginning. As stated above, however, the parties are in agreement that the land was not taxable during the 25-year period from 1927 to 1952.

[1, 2] Appellants' position that taxation was barred solely due to a "vested right to tax immunity" passes over the character of the taxation involved. Logic would dictate that if Zay Zah received a fee simple in 1927 by reason of the Clapp Amendment, the land would have been subject to state taxation ab initio; but if Zay Zah had received a trust patent, meaning that the land was held by the Federal government in trust for him, it would not be subject to state taxation. See, *United States v. Rickert*, 188 U.S. 432, 437, 23 S.Ct. 478, 480, 47 L.Ed. 532, 536. The vested right to be free from state taxation must derive from somewhere, and its only possible source was the trust patent itself. After all, it is the land which is exempt from property tax, not the individual who happens to own or possess the land at any given time.[1] The principle established by *Rickert* is that

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[1] This principle is clearly stated by the Supreme Court in *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912), a case

land held in trust by the United States is exempt from state taxation during the period of that trusteeship, and none of the rights derived from the trust can be divested without due process under the Fifth Amendment.

This analysis is supported by *Morrow v. United States,* 243 F. 854 (8 Cir. 1917), wherein the Eighth Circuit resolved a matter similar to the present case. The Court of Appeals stated the issue to be—

> "• • • whether or not the land of an adult mixed-blood Chippewa Indian allotted, patented, and held under the provisions of the Nelson Act (January 14, 1889, 25 Stat. 642) is, since the enactment of the so-called Clapp Amendment (June 21, 1906, c. 3504, 34 Stat. 353), subject to state and local taxation, where the allottee has never attempted to avail himself of any power he might have under that amendment to alienate or incumber, but on the contrary is insisting upon holding it according to the provisions of a trust patent issued under the authority of the Nelson Act." 243 F. 855.

The positions taken by the parties were these:

> "Appellants properly concede that there was no right of taxation while the land was held solely under such trust patent. They contend that the Clapp Amendment enacted four years subsequent to the issue and during the life of this trust patent had the effect of terminating it and of vesting a complete fee title in the allottee irrespective of his consent to such a change. An answer-

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involving Oklahoma Choctaw and Chickasaw Indians holding tax-exempt lands under trust patents. Referring to the language in the Curtis Act, the act pursuant to which the Indians had received their patents, 30 Stat. 495, 507, that "all land shall be non-taxable," the court stated that this "naturally indicates that the exemption is attached to the land—only an artificial rule can make it a personal privilege." 224 U.S. 675, 32 S.Ct. 569, 56 L.Ed. 946.

> ing contention of the government is that Congress had no power to alter this 'trust patent' status without the consent of such patentee, because such trust patent, issued under the Nelson Act, conveyed a property right to this patentee which had become vested. The property right intended being the separate beneficial use of the land free from taxation and involuntary alienation for 25 years from date of trust patent, with fee title thereafter." Ibid.

The court began its analysis as follows:

> "There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter. *Williams v. Johnson,* 239 U.S. 414, 420, 36 Sup.Ct. 150, 60 L.Ed. 358; *Sizemore v. Brady,* 235 U.S. 441, 449, 35 Sup.Ct. 135, 59 L.Ed. 308; *Choate v. Trapp,* 224 U.S. 665, 32 Sup.Ct. 565, 56 L.Ed. 941; *English v. Richardson,* 224 U.S. 680, 32 Sup.Ct. 571, 56 L.Ed. 949; *Jones v. Meehan,* 175 U.S. 1, 20 Sup.Ct. 1, 44 L.Ed. 49; *Chase v. U.S.,* 8 Cir., 222 F. 593, 596, 138 C.C.A. 117. Such property rights may result from agreements between the government and the Indian. Whether the transaction takes the form of a treaty or of a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian.
>
> "That exemption of land from taxation is a property right is established. *Choate v. Trapp,* supra. That this Indian had taken possession of and was enjoying this land under such an exemption at the time the Clapp Amendment was passed is undisputed. Therefore, if this exemption came to him as a legal right, it had fully vested. It came as such legal right if it rested on the solid basis of a binding agreement. If there was

such an agreement here, it is to be found in the terms of the Nelson Act, read in the light of attendant circumstances." 243 F. 856.

The court held that exemption from taxation was one of the rights intended to pass with the trust patent under the Nelson Act:

> "A trust patent in exact compliance with such understanding and agreement was issued this Indian, and under it he has taken and holds this land. His rights are vested and are impervious to alteration against his will except through the sovereign power of eminent domain. One of these rights was freedom from state and local taxation." 243 F. 858.

The only distinguishing factor between the present case and the *Morrow* case is that in *Morrow,* the trust patent was issued prior to the passage of the Clapp Amendment, while in the present case the patent was issued approximately 20 years after the Clapp Amendment.

This fact fails to distinguish *Morrow* since appellants admit that Zay Zah's property was not taxable from 1927 to 1952, because there was a "vested right to tax immunity" during this period. As made clear in *Morrow,* this exemption is derived directly from the trust patent itself:

> "The instant case is not one depending upon governmental wardship over a dependent and inferior people, but is based upon the legal relation of trusteeship, and springs from the obligation contained in the terms of the trust to preserve the land, so that at the end of the trust period it can be passed to the beneficiary 'free of all charge or incumbrance.' " 243 F. 859.

If the Clapp Amendment was ineffective to destroy the tax exemption during this period, it must also have been ineffective to destroy the legal source of that exemption,

namely, the trusteeship established by the patent. The court in *Morrow* viewed the trust patent as a "binding agreement," which vested in the patentee the property right to "separate beneficial use of the land free from taxation and involuntary alienation for 25 years from date of trust patent, with fee title thereafter." 243 F. 856. This language, when viewed in light of the trust patent itself, makes clear that the tax-exempt status of the land covered by the patent was derived from the trusteeship itself, and could not be lost unless the trust itself was terminated. The holding of *Morrow* is that the Clapp Amendment does not terminate the trust, thus it could not create a fee simple title subject to taxation.

This court followed the *Morrow* decision in *Warren v. County of Mahnomen,* 192 Minn. 464, 257 N.W. 77 (1934), a case similar on its facts to *Morrow.* In *Warren* we stated:

> "That, during the determinative period, plaintiff's land was exempt from taxation is clear. The precise point is determined for him by *Morrow v. United States* (8 Cir.) 243 F. 854, 859. The decision was not based 'upon governmental wardship over dependent and inferior people' but rather was put upon '*the legal relation of trusteeship*' between the federal government, as trustee, and the Indian allottees as beneficiaries. The resulting obligation, preventing taxation during the continuance of the trust, '*springs from the obligation contained in the terms of the trust* to preserve the land, so that at the end of the trust period it can be passed to the beneficiary "free of all charge or encumbrance." ' " 192 Minn. 465, 257 N.W. 78. (Italics supplied.)

Although *Warren* similarly involved a trust patent issued prior to the Clapp Amendment, this again will not serve to distinguish it from the present case.

The case of *Mahnomen County v. United States,* 319 U.S. 474, 63 S.Ct. 1254, 87 L.Ed. 1527 (1943), does not require a different interpretation of the Clapp Amendment. That case also involved a trust patent issued prior to the Clapp Amendment, but dealt with a somewhat different question, whether a county had to refund property taxes assessed by the county and paid by an Indian during the period of a trust patent. In holding that the taxes need not be refunded, the United States Supreme Court made the following remarks concerning the effects of the Clapp Amendment:

> "Notwithstanding these acts the County concedes, and we assume arguendo, that it was without power to impose a tax upon these allotted lands prior to 1928 against the consent of the Indians. *Choate v. Trapp,* 224 U.S. 665 [32 S.Ct. 565, 56 L.Ed. 941]. The Clapp Amendment gives the consent of the United States to state taxation, thus removing the barrier to taxation found to exist in *United States v. Rickert, supra;* but under *Choate v. Trapp* the Indian, who has gained a 'vested right' not to be taxed, must also consent." 319 U.S. 476, 63 S.Ct. 1256, 87 L.Ed. 1530.

The Clapp Amendment is thus seen to have the effect of permitting Indians covered by its terms to convert their trust patents, whether issued before or after the passage of the Amendment, into fee simple titles subject to taxation. Nevertheless, once the trust patent has been issued, it cannot be so converted without the consent of the patentee. The binding trust agrement continues in full effect, with its attendant tax exemption, until its term expires or the patentee accepts title in fee simple. This reading of the Clapp Amendment is fully consistent with *Morrow v. United States, supra,* and *Warren v. County of Mahnomen, supra.*

In the instant case it is undisputed that Zay Zah took no action to convert his trust patent into a fee simple as permitted by the Clapp Amendment. The trust created in 1927 therefore continued in full effect until 1952; the freedom from taxation during that period being derived from the "legal relationship of trusteeship" established by the patent.

Under the terms of the trust patent Zay Zah's land would have become his in fee simple in 1952, thereafter fully subject to state taxation. Respondents assert, however, that the Wheeler-Howard Act, 25 U.S.C.A., § 462, extends Zay Zah's trust patent indefinitely. Since Zay Zah's trust patent was in existence at the time of the Wheeler-Howard Act, § 462 must be interpreted as extending the trust period unless contrary considerations can be found. Appellants admit that "read alone, the Wheeler-Howard Act would seem to extend indefinitely the trust period and restrictions placed on any Indian land."

Appellants' principal argument against such extension is that the mixed-blood Indians of the White Earth Reservation were "fully emancipated by virtue of the Clapp Amendment." They cite the following cases to support their argument: *United States v. Waller,* 243 U.S. 452, 37 S.Ct. 430, 61 L.Ed. 843 (1917); *Dickson v. Luck Land Company,* 242 U.S. 371, 37 S.Ct. 167, 61 L.Ed. 371 (1917); *Baker v. McCarthy,* 145 Minn. 167, 176 N.W. 643 (1920); and *United States v. Spaeth,* 24 F.Supp. 465 (D.C.Minn. 1938). However, the first two cases were explicitly distinguished in the *Morrow* decision:

> "The court has not overlooked the decisions in *Dickson v. Luck Land Co.* (1917) 242 U.S. 371, 37 Sup.Ct. 167, 61 L.Ed. 371, and *United States v. Waller* (1917) 243 U.S. 452, 37 Sup.Ct. 430, 61 L.Ed. 843. In the *Dickson* case the only question was whether, in a suit between rival grantees of land allotted and patented to a mixed-blood Chippewa Indian in the White Earth Reservation, and by him conveyed, the issue of the

patent (not a trust patent) was conclusive as to the adulthood of the Indian at the time of its issue. There the Indian had fully availed himself of the terms of the Clapp Amendment, had secured a patent thereunder, and had alienated his land. The suit in this court is based upon refusal of this Indian to change his status by acceptance and exercise of the powers offered in the Clapp Amendment. In the *Waller* case the question was whether the government could properly bring a suit to set aside conveyances of land by mixed-blood Chippewa Indian allottees on the ground that the conveyances had been fraudulently obtained. The court held the government was not a proper party because the wardship of the government had been, in respect to their lands, removed from such Indians by the Clapp Amendment. The court says:

> " 'The act thus evidences a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands.' " 243 F. 858.

In both these cases, the Indian patentees had voluntarily chosen to alienate their lands as permitted by the Clapp Amendment, but neither case addresses the issue in the present case, where the Indian patentee wishes to retain the trust status of the land.

The case of *Baker v. McCarthy, supra,* involved the sale of land held under a trust patent by the heirs of the original patentee. In that case this court held the sale valid, taking the following view of the Clapp Amendment:

> "• • • We think it is the general view that the issuance of a fee-simple patent operates, by implication, to emancipate the Indian from Federal guardian-

> ship and jurisdiction. *Luck Land Co. v. Dickson,* 132 Minn. 396, 157 N.W. 655, affirmed 242 U.S. 371, 37 Sup. Ct. 167, 61 L.Ed. 371. We hold that the same result was accomplished by the provision of the Clapp amendments converting the trust deeds theretofore issued in the case of adult mixed-bloods into instruments of fee-simple title, see *United States v. Waller,* 243 U.S. 452, 37 Sup.Ct. 430, 61 L.Ed. 843 • • •." 145 Minn. 170, 176 N.W 644.

If controlling, such language would make the Wheeler-Howard Act totally inapplicable, since by this analysis Zay Zah, being an adult mixed-blood Indian in 1927, would have held a fee simple from the issuance of the "trust patent." The *Baker* decision, however, cannot be reconciled with our later decision in *Warren v. County of Mahnomen, supra.* The *Warren* case clearly holds that land held under a trust patent is exempt from taxation, relying upon the *Morrow* case as noted above. Further, in *Warren* we explicitly noted the importance of no fee simple patent having been issued:

> "• • • That conclusion [i.e., the *Morrow* holding of nontaxability based upon 'trusteeship' between the Federal government as trustee and the Indian allottees as beneficiaries] is especially applicable here because the fee patent had not been delivered, and plaintiff had made no application for its issue." 192 Minn. 466, 257 N.W. 78.

The "trusteeship" theory of *Warren* and *Morrow* cannot be squared with the "automatic fee simple" theory of *Baker.* Therefore, the district court was not in error to conclude that *Warren* "overruled *Baker,* at least by implication."

The final case relied upon by appellants to show the ineffectiveness of § 462 of the Wheeler-Howard Act is *United States v. Spaeth,* 24 F.Supp. 465 (D.C.Minn.1938).

The issue in *Spaeth* was whether Executive Orders of 1920 and 1927 had extended trust patents of Indians who were affected by the Clapp Amendment. The factual situation was somewhat unusual in that all but two of the Indians involved had received fee title patents from the government, though they had not requested such patents. The court in *Spaeth* stated:

> "The removal of the restriction of alienation, however, does not necessarily interfere with or imperil the immunity from taxation. That is a vested right. But while it was necessary to obtain the Indian's consent to divest him of the guaranteed non-taxable land during the twenty-five year period, it was not necessary to obtain his consent to clothe him with authority to alienate his land. In some instances, it may have been a distinct benefit to the Indians to be able to give fee title. Presumably, Congress determined that adult mixed-blood Indians on the White Earth Indian Reservation were capable of self-management so far as their lands were concerned. That the Government recognized the plain intendment of the Clapp Amendment is reflected by the action of the Department in issuing fee patents to the adult mixed-blood White Earth Indians." 24 F.Supp. 468.

The court summarized, "A title tantamount to fee by reason of legislative enactment [i.e., the Clapp Amendment] existed in the allottee." The Executive Order could thus not extend a trust because "the President did not intend to extend something that did not exist." Ibid. The court concluded with the following remarks:

> "• • • Whatever effect this order may have must be limited to the full bloods, because the Clapp Amendment divested the United States of any title to lands of the adult mixed bloods. The whole and complete title by virtue of that amendment passed from the United

> States to the Indians. Clearly, therefore, the Executive Order had no effect on the lands in question—the Government admits as much.
>
> "The twenty-five year period has now expired. The contract with the Indians to deliver their fee title at the expiration of this period 'free of all charge and incumbrance whatsoever' has been fulfilled. The assurance given to these Indians when the Nelson Act and General Allotment Act were discussed with them that their lands would not be taxed for twenty-five years has been made good. The vested right has terminated. The lands are not only free from any restriction of alienation, but they must now bear their fair share of the taxable burden. It is the Court's view, therefore, that all of the lands referred to in the stipulation are exempt from taxation for a period of twenty-five years from the date of the trust patent and no longer." 24 F.Supp. 469.

As discussed above, this reasoning is not consistent with the "trusteeship" basis for tax exemption explained in *Morrow*. Commenting upon the *Spaeth* decision, the district court in the instant case noted in its memorandum:

> "The basic flaw in [the reasoning of the Federal District Court in *Spaeth*] is apparent. If fee title vested immediately on passage of the Clapp Amendment, the land would be subject to *immediate* taxation. However, the Court, nevertheless, ruled that the tax exemption continued until the end of the 25-year trust, just as conceded by the plaintiffs in the case under consideration. By so ruling, the Court's language relative to the inefficacy of the extension orders robs the case of any real authority, especially in view of *Morrow*, not cited nor recognized by [the Court], even though decided by the 8th Circuit." (Emphasis original.)

There is simply no way to reconcile the granting of a fee simple via a trust patent with a vested right to tax immunity under that same patent. While it is undoubtedly true that the Clapp Amendment "emancipated" certain Indians to the extent that they could, if they wished, obtain fee title to their lands and then be required to pay taxes thereon, it could not at one and the same time automatically make trust patents into fee patents and yet maintain the tax-exempt status of the land. This status, admittedly not destroyed by the Clapp Amendment even as to trust patents issued subsequent to its passage, can only arise from the fact that the land was indeed still held in trust by the Federal government under a binding agreement with the White Earth Indians. The district court therefore correctly held that the decision in *Spaeth* is not consistent with the holding of *Morrow v. United States, supra,* which we accepted in *Warren v. County of Mahnomen, supra,* and affirm herein.

We conclude that the trusteeship agreement between Zay Zah and the United States did not terminate in 1952, but was rather extended indefinitely by the Wheeler-Howard Act of 1934. It follows that the tax-exempt status of this land, derived as it was from the trust agreement, did not terminate in 1952, and hence the land did not become subject to forfeiture for nonpayment of taxes. Equitable title under the trust remained in Zay Zah, and has now passed to his sole heir George Aubid, Sr.; fee title remains in the United States unless and until the holder of the trust patent applies for and obtains from the United States a fee patent. We reach this result based solely upon the facts of this case. We intimate no opinion as to what might be the result in a different factual setting such as, but not limited to, a situation where title to former trust patent property has already been quieted.

Affirmed.

WAHL, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

YETKA, Justice (concurring specially).

Although I must concur in the result reached in this case, I believe that it contributes to the still unresolved problems which are the product of shifting Federal policies towards Indian tribes. I am particularly concerned with the specific result in the present case, because there is no accurate estimate of the number of titles and amount of land affected. The attempt to limit this decision narrowly to its facts cannot be wholly successful. Its reasoning is bound to be persuasive in cases involving other land titles, even where title has already been quieted. This possibility raises serious due process considerations which were not before us in the present case but are just below the surface.

In *Bryan v. Itasca County,* 303 Minn. 395, 406, 228 N.W. 2d 249, 256 (1975), reversed, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), we expressed misgivings about the twists and turns of Federal policy toward Indians as follows:

> "It has been the Federal government, though its vacillation in determining the best course to follow for over 100 years, that has led to the present confusion, including the issues raised by this lawsuit. The government first appears to move toward termination and assimilation, then to retreat from those objectives, and retrenches, this indecision has resulted in a great deal of confusion."

The fact that the statutory interpretation espoused by this court was ultimately incorrect only serves to highlight those misgivings.

The passage in 1953 of Public Law 280, 67 Stat. 583,[1] as amended, 18 U.S.C.A., § 1162, and 28 U.S.C.A., § 1360, marked the beginning of the most recent assimilation policy toward Indians, but as suggested in *Bryan v. Itasca County*, 426 U.S. 373, 387, 96 S.Ct. 2102, 2111, 48 L.Ed.2d 710, 720 (1976), that policy is not as strong today, if it ever was a *total* assimilationist policy.[2] It appears now that the Federal government wishes to preserve Indian culture and strengthen tribal self-government.

The state's dilemma in the present situation is clear from an examination of Public Law 280 and the present case. Since jurisdiction has been asserted by the state over criminal and civil matters on most reservations, there is an increased need for services and personnel. However, removal of additional lands from taxation, as in the present case, shrinks the tax base which provides funds for the services. If, as suggested by the United States Supreme Court in *Bryan*, extension of state taxing power would cripple tribal self-government, and if as suggested by the present opinion state and local power to tax Indian-owned lands is more restricted than previously supposed, the state and local tax burdens will be even greater. If Federal policy contemplates strengthened tribal government (cf. *Bryan v. Itasca County*, 426 U.S. 373, 388, note 14, 96 S.Ct. 2102, 2111, 48 L.Ed.2d 710, 721) with reliance on state and local governments to provide services that would otherwise be unavailable, then the Federal government must accept the financial responsibility for providing the services.[3] If states

[1] Subsequently amended by 69 Stat. 795, 72 Stat. 545, and 84 Stat. 1358.

[2] The General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C.A. §§ 331 to 358, was part of an earlier Federal assimilation policy which ended in 1934. See, discussion in *Kake Village v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

[3] The Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C.A., § 1451 to § 1543, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C.A. § 450, et seq., provide funds for internal tribal development. The missing ingredient is aid for states providing services.

cannot tax tribal property on the reservation or lands allotted to individual Indians, they must be reimbursed for providing services on the reservations. The existence of this dilemma has been recognized since the passage of Public Law 280 (see, colloquy between Congressman Young and Chief Counsel Sellery of the Bureau of Indian Affairs, quoted in *Bryan*, 426 U.S. 381, 96 S.Ct. 2108, 48 L.Ed.2d 717).

Taxation is not the only area of uncertainty in Federal Indian policy. One commentator has noted generally with regard to the status of all Indian treaty rights the following:

> "Unfortunately, the body of law protecting basic Indian treaty rights is in evident disarray. There are so many tests for determining whether an abrogation has been effected, and most of them are so vague, that a court has little recourse but to arrive at an ad hoc, almost arbitrary decision when faced with the question of whether a particular treaty guarantee has been abrogated by Congress." Wilkinson and Volkman, "*Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth'—How Long a Time Is That?*" 63 Calif.L.Rev. 601, 608.

The basic point is the same as in the present case primarily because of the lack of coherent or consistent Federal policy.

The continuing uncertainty about the status of Indian tribes and land holdings can only serve to exacerbate tensions between the white and Indian communities. While property tax exemption is viewed by Indians as a right deriving from special historical status and a means of strengthening cultural identity, it is viewed by whites as a

privilege and a lack of fundamental fairness. This kind of problem could be solved by a consistent Federal policy exercised with more concern for its long range effects.

The Federal government has exclusive and plenary power to legislate for Indian tribes. This power is derived from several sources. U.S.Const. art. 1, § 8, provides in part that:

> "The Congress shall have Power: • • To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The other constitutional source from which the Federal government derives its power over Indian tribes is the treaty power found in U.S.Const. art. 2, § 2, which provides in part that:

> "[The president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties • • •."

See, *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Because of the breadth given this power by the courts the Federal government may treat Indian tribes as "wards" with special status, despite the constitutional requirement that all who are citizens be treated equally.[4] The breadth of the Federal power over Indian tribes and its resulting conflicts with equal protection theory

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[4] The Fifth Amendment due process clause requires that the Federal government treat citizens equally, just as the Fourteenth Amendment requires the states give all citizens equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). Even though the United States Supreme Court has held that equal protection and Indian preference are not incompatible, the problems underlying such conflicts still exist. See, *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); cf. *United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed. 2d 701 (1977).

require that the power be exercised with regard to its effect on non-Indians as well as Indians.[5]

KELLY, J., took no part in the consideration or decision of this case.

WAHL, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

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[5] One possible alternative is retrocession of jurisdiction to the Federal government under 25 U.S.C.A., § 1323. The result of this, however, can lead to unequal treatment of Indians and whites which nonetheless is not vulnerable to equal protection and due process attack. Retrocession would be consistent with current Federal policy and would serve to alleviate some of the financial burdens on local government. The state has taken advantage of this law in one limited instance. See, L. 1973, c. 625.

APPENDIX B

Opinion of the District Court, Ninth Judicial District, State of Minnesota, not yet reported

Findings of Fact, Conclusions of Law, and Order for Judgment

STATE OF MINNESOTA
COUNTY OF CLEARWATER
IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

STATE OF MINNESOTA; COUNTY OF CLEARWATER, a municipal corporation; EUGENE STEVENS and LAURIE STEVENS,
Plaintiffs,

v.

ZAY ZAH, CHARLES AUBID, GEORGE G. AUBID, SR., A. J. POWERS, LUELLA POWERS, GORUM RICHARD POWERS, ANNIE DAVIS, MARY SHINGOBE formerly MARY DAVIS, HENRY DAVIS, JOHN DAVIS, JIM DAVIS, FRANK BENJAMIN, JOE BENJAMIN, MAGGIE BENJAMIN, NE SHO GAH BOW E QUAY, and also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the lands described in the Complaint herein, *Defendants.*

The above-entitled matter came on to be heard before the undersigned, one of the Judges of the above-named Court, on August 28, 1975, at the Court House in the City of Bagley, County of Clearwater, State of Minnesota. Aurel L. Ekvall, Esq., appeared in behalf of the plaintiffs; and John M. Holmes, Esq., appeared on behalf of the defendants Zay Zah, also known as Charles Aubid, and George G. Aubid, Sr. There was no appearance on behalf of the other defendants.

On the stipulation of facts entered into by and between the appearing parties, through their attorneys, the arguments and briefs of counsel, and on all the files and proceedings herein, and the Court being fully advised in the premises, now makes the following:

FINDINGS OF FACT

I.

That plaintiff State of Minnesota did become the owner of the following tract of land located in Clearwater County, State of Minnesota, by reason of an absolute forfeiture of the same to the plaintiff State of Minnesota for delinquent taxes, and that the plaintiffs Eugene Stevens and Laurie Stevens did receive a good and valid conveyance thereof from the plaintiff State of Minnesota, and are now in possession of the said tract of land, more particularly described as follows:

> The Southwest quarter of the southwest quarter less the road right-of-way, Section five, Township 144 north, Range 38 west, of the Fifth Principal Meridian, according to Government Survey thereof,

and that none of the defendants, including the appearing defendants, Zay Zah, also known as Charles Aubid, and George G. Aubid, Sr., make any claim against or have any right, title, or interest to the said tract of land.

II.

That prior to September 6, 1927, the United States of America was the sole and true owner of the following described real estate located within the original boundaries of the White Earth Reservation in the State of Minnesota, Clearwater County, viz.:

> Northwest quarter of the southeast quarter, Section five, Township 144 north, Range 38 west, of the Fifth Principal Meridian.

III.

That Zay Zah, also known as Charles Aubid, is shown by the roll of the Chippewa Indians allotted within the White Earth Reservation in the State of Minnesota, pre-

pared by the Commission duly appointed under the Act of Congress of June 30, 1913, as amended by the Act of Congress on March 2, 1917, and that said roll shows that as of the first day of October, 1920, the said Zay Zah was an adult mixed-blood Indian then 34 years of age, having thus been born in the year 1886 A.D.

IV.

That on September 6, 1927, the United States of America allotted onto the said Zay Zah the Northwest quarter of the southeast quarter of Section five, in Township 144 north of Range 38, west of the Fifth Principal Meridian, Clearwater County, Minnesota, and another 40-acre tract which is not the subject of this controversy, and in said allotment did declare that the United States did hold and would hold said real estate thus allotted subject to all statutory provisions and restrictions, for a period of 25 years in trust for the sole use and benefit of the said Zay Zah, and at the expiration of said period, the United States would convey the same by patent to the said Indian, Zay Zah, in fee, discharged of said trust and free from all charge and encumbrance whatsoever, which trust patent was filed for record August 18, 1941 in Book 30 of Deeds, Page 531 in the office of the Register of Deeds, Clearwater County, Minnesota.

V.

That said Zay Zah, also known as Charles Aubid, did not at any time during his lifetime apply for a patent in fee simple to the above-described real estate or convey the same, nor did the United States of America at any time issue or deliver a patent in fee simple to the said Zay Zah during the lifetime of the said Zay Zah.

VI.

That the said Zay Zah, also known as Charles Aubid, did die on May 28, 1969 at the age of about 83 years, and did

leave surviving him as his sole heir a son, defendant George G. Aubid, Sr.

VII.

That on September 11, 1940, the Auditor for Clearwater County executed a tax certificate of forfeiture, certifying that the time for redemption of the above-described real estate for nonpayment of taxes for the year 1931 had expired and that absolute title to said real estate thereby vested in the State of Minnesota and that said tax certificate of forfeiture was recorded in the office of the Register of Deeds, County of Clearwater in Book I of Miscellaneous, page 602; and that an Application for Cancellation of said Certificate of Forfeiture for the reason that said real estate was held under a Trust Patent, the terms of which had not expired, and therefore tax exempt, was upon the recommendation of the County Board cancelled on January 30, 1947, as to the above-described real estate, which certificate was registered in the office of the Register of Deeds, County of Clearwater, in Book K of Miscellaneous, page 246.

VIII.

That the County of Clearwater thereafter assessed real estate taxes upon the above-described property for the year 1954, at which time the above-described property appeared of record in the Office of the Register of Deeds of Clearwater County in the name of Zay Zah, who at that time was an adult mixed-blood Chippewa Indian, and also known as Charles Aubid, one of the defendants herein.

IX.

That in proceedings to enforce the payment of taxes claimed to be delinquent for the year 1954, the County of Clearwater obtained a real estate tax judgment which was entered in the District Court for said county on March 27, 1956; that on October 2, 1961, the Auditor for the County

of Clearwater executed a tax certificate of forfeiture, certifying that the time for redemption of said real estate had expired, and that absolute title to said real estate thereby vested in the State of Minnesota.

X.

That the Commissioner of Taxation for the State of Minnesota conveyed the above-described real estate by Conveyance of Forfeited Lands, dated May 4, 1973, unto Eugene Stevens and Laurie Stevens, as joint tenants and not as tenants in common, their assigns, the survivor of said parties, and the heirs and assigns of the survivor forever, excepting and reserving to the said state, in trust for the taxing districts concerned, all minerals and mineral rights, as provided by law, Eugene Stevens and Laurie Stevens to have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to said parties, their assigns, the survivor of said parties, and the heirs and assigns of the survivor, forever, said parties taking as joint tenants and not as tenants in common.

XI.

That the parties disagree as to which party, if any, is in possession of the Northwest quarter of the southeast quarter, Section five, Township 144 north, Range 38 west, Clearwater County, Minnesota, but determination of that issue is not necessary to the determination of the issues raised by the parties.

And from the foregoing, the Court makes the following:

Conclusions of Law

I.

That plaintiffs Eugene Stevens and Laurie Stevens are the sole absolute owners, as joint tenants and not as tenants

in common, in fee simple of the following tract of real estate situated in the County of Clearwater and State of Minnesota, viz.:

> The Southwest quarter of the southwest quarter less the road right-of-way, Section five, Township 144 north, Range 38 west, of the Fifth Principal Meridian, according to the Government Survey thereof,

except for minerals and mineral rights therein which are reserved to the State of Minnesota.

II.

That the defendants have no right, title, estate, interest, or lien in or to the Southwest quarter of the southwest quarter less the road right-of-way, Section five, Township 144 north, Range 38 west, of the Fifth Principal Meridian, according to the Government Survey thereof.

III.

That the defendant George G. Aubid, Sr., is the sole beneficial owner and cestue que trust of the Northwest quarter of the southeast quarter of Section five, Township 144 north, Range 38 west of the Fifth Principal Meridian, Minnesota, with the United States of America the legal trustee under that certain trust patent issued September 6, 1927, and recorded on August 18, 1941, in Book 30 of Deeds, page 531, in the office of the Register of Deeds, Clearwater County, Minnesota.

IV.

That forfeiture proceedings relating to the said Northwest quarter of the southeast quarter, Section five, Township 144 north, Range 38 west of the Fifth Principal Meridian, appearing in Book I of Miscellaneous Records, page 602, and in Book Q of Miscellaneous Records, page 340,

in the office of the Register of Deeds, Clearwater County, are null and void, as is the purported deed by the plaintiff State of Minnesota to the plaintiffs Eugene Stevens and Laurie Stevens, dated May 4, 1973, and recorded in Book 74 of Deeds, page 518, as Document No. 94702 in the office of the Register of Deeds, County of Clearwater, State of Minnesota.

V.

That the defendant George G. Aubid, Sr. is entitled to the sole use, benefit, and quiet and lawful and peaceable possession of said real estate until and unless he is divested of the same by a constitutional act of the Congress of the United States of America, or until and unless a fee patent covering the said 40-acre tract is issued and delivered by the United States of America to him or his lawful heirs, and accepted by him or his lawful heirs.

VI.

That the period of trust provided for in the said trust patent issued to Zay Zah on September 6, 1927 is continued until further constitutional act of the United States Congress, or the issuance and delivery of a fee simple patent to defendant George G. Aubid, Sr., or his heirs, and the acceptance of the same by the said defendant, George G. Aubid, Sr., or his heirs, and that during said period of trust, none of the plaintiffs nor the defendants except the said George G. Aubid, Sr., shall have any right, title, estate, lien or interest whatsoever in or to said real estate, nor shall the plaintiff State of Minnesota and/or County of Clearwater have any right to levy real estate taxes against the same.

VII.

That defendant George G. Aubid, Sr., is entitled to his costs and disbursements, but only against plaintiffs Eugene Stevens and Laurie Stevens.

VIII.

That the attached memorandum is made a part hereof.

LET JUDGMENT BE ENTERED FORTHWITH ACCORDINGLY.

Dated at Grand Rapids, Minnesota
the 1 day of March, 1976.

BY THE COURT:
/s/ JOHN A. SPELLHEY
John A. Spellhey
Judge of District Court

Memorandum

I.

Introduction

While there had been both encounters and treaties between the Chippewa or Ojibway Indians on the one hand, and the United States of America on the other, prior to 1825, these did not involve the Minnesota Chippewas. The first treaty involving the latter was, in fact, an enforced treaty between the Sioux and the Chippewa whereby the former were relegated to the area generally south of a line running east of St. Cloud to the eastern boundary of Minnesota, and west from St. Cloud to Alexandria, and thence northwest through Fergus Falls and Moorhead to the western boundary of the state. This treaty, approved August 19, 1825, appears in 7 Stat. 272, 2 Kappler 250.

Beginning in 1837 and continuing until 1866, great chunks of the Chippewa hunting grounds were gobbled up by hungry Minnesota homesteaders acting through and with the consent of the United States Government.

In the treaty of 1855, 10 Stat. 1165, 2 Kappler 685, final cession of the lands now embraced not only within the limits of the White Earth Reservation, but also the Leech Lake Reservation was accomplished, and reservations were established for the Pillager and Winnibigoshish bands on Cass Lake, Leech Lake, and Lake Winnibigoshish and five other lakes. A concentration treaty was then negotiated on March 11, 1863 (12 Stat. 1249, 2 Kappler 839). Five reservations on Rabbit Lake, Gull Lake, Sandy Lake, Rice Lake and Lake Pokegama were given up in exchange for promises to prepare land for planting, supplying of carpenters, blacksmiths, a physician, et cetera on the three remaining reservations.

In 1867 the White Earth Reservation was created, containing White Earth Lake and Rice Lake and 36 townships

of land. 16 Stat. 719, 2 Kappler 97. As explained in *Selkirk* v. *Stephens*, 72 Minn. 335, 75 NW 386, the reservation was created "in order to provide them (the Indians) with a suitable farming region". Folwell in his "History of Minnesota", IV, p. 195, describes the new reservation as follows:

> "The White Earth Reservation was believed to be an ideal country for the Indian. The two tiers of townships on the west were beautiful rolling prairie, with a deep soil of rich loam on clay subsoil. The two eastern tiers of townships were well timbered with pine, sufficient for the uses of the residents for an indefinite time. The two intermediate tiers were mingled timber and prairie, most desirable for the settler. Every township was dotted with lakelets and all parts of the reservation were drained by rivulets running either to the Crow Wing or to the Red River."

While the Chippewa of the Mississippi were in no great haste to move to the new reservation and to give up their hunting and fishing traditions in favor of farming, by 1876 over 1,400 Indians resided on the White Earth Reservation. Folwell, id. 197. The Northwest Indian Commission appointed in 1886 eventually led to the Nelson Act of 1889. 25 Stat. 642, 1 Kappler 301.

Meanwhile, the General Allotment Act was enacted February 8, 1887, 24 Stat. 388, 25 U.S.C. 348, 1 Kappler 33.

Defendant Zay Zah, a mixed-blood Chippewa Indian, was born in 1886, and acquired his second 80-acre allotment which includes the 40 acres claimed by plaintiffs' Stevens, in 1927.

The General Allotment Act was amended in 1906, 34 Stat. 182, 25 U.S.C. 349, 3 Kappler 181. The amendment provided that the Secretary of the Interior could issue a fee simple patent which would effectively terminate all re-

strictions as to alienation or taxation "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs".

The Clapp Amendment, relied upon by plaintiffs, was enacted at the behest of Senator Moses Clapp of Minnesota on June 21, 1906, 34 Stat. 353, 3 Kappler 220; and was amended March 1, 1907, 34 Stat. 1034, 3 Kappler 285. Plaintiffs claim that no later than 25 years following the date of his allotment on September 6, 1927, Zay Zah's allotment land became subject to taxation by the State of Minnesota and Clearwater County.

The Wheeler-Howard Act of 1934, 48 Stat. 984, 25 U.S.C. 462, 5 Kappler 378, is relied upon by defendant George G. Aubid, Sr. as extending the period of trust, as contained in his father, Zay Zah's allotment, up to the present time, and for the interminable future, making it immune to tax delinquency proceedings initiated by Clearwater County, and rendering the claims of all plaintiffs to that allotment null and void.

II.

General Principles of Construction of Indian Treaties and Laws.

Minnesota concedes that Federal law, rather than State law, must be used to determine the proper interpretation of Indian laws and treaties. *State* v. *Jackson*, 218 Minn. 429, 16 NW2d 752.

While the rule has been stated in various ways, "the canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice". *Antoine* v. *Washington*, —— U.S. ——, —— S.Ct. ——, 43 L.Ed. 2d 129 (Feb. 19, 1975). The Court in *Antoine* cited numerous cases, including *Worcester* v. *Georgia*, 31 U.S. 515, 8 L.Ed. 483, written by Chief Justice

John Marshall in 1832; and *Choate v. Trapp*, 224 U.S. 665, 675, 56 L.Ed. 941, 32 S.Ct. 565. The language of *Choate*, "the construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith", is quoted as recently as *DeCoteau v. District County Court*, —— U.S. ——, —— S.Ct. ——, 43 L.Ed. 2d 300, at p. 314, decided March 3, 1975.

III.

Characteristics of the Trust Impressed Upon Allotments Issued Pursuant to the General Allotment Act and the Nelson Act.

Both parties agree that Zay Zah's allotment was issued pursuant to the Nelson Act, which, in turn, incorporated by reference the General Allotment Act of 1887.

Judge James E. Preece of the Ninth Judicial District, County of Cass, in the recent case of *State of Minnesota v. Forge et al*, has so thoroughly discussed all of the provisions of the Nelson Act that it would be a waste of judicial manpower for me to do anything but concentrate my attention upon the meaning of the trust provisions contained in Zay Zah's allotment and all allotments issued under the General Allotment Act.

Cohen, in his original "Handbook of Federal Indian Law", p. 216, makes it clear that each Indian, including children, was entitled to the trust safeguards. Since Zay Zah was in being as a child in both 1887 and 1889, there can be no doubt about his entitlement to be vested with the same rights and privileges as were all Indians covered by the Nelson Act as a quid pro quo for the valuable lands ceded by the Chippewa Tribe theretofore.

The cornerstone of the trust is its freedom from state taxation. *United States v. Rickert,* 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532. Speaking for the Court, Justice Harlan said at p. 437:

> ". . . there was no power in the state of South Dakota for state or municipal purposes to assess and tax the lands in question until at least the fee was conveyed to the Indians . . . To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race . . . The government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, 'and free of all charge or encumbrance whatsoever'. To say that these lands may be assessed and taxed by the County of Roberts under the authority of the State is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from encumbrances."

More recently, in *Squire v. Capoeman,* 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956), the Court stated, in construing both the original General Allotment Act of 1887, and the amendatory act of May 8, 1906, as follows (p. 8):

> "The literal language of the proviso evinces a Congressional intent to subject an Indian allotment to all taxes *only after a patent in fee is issued to the allottee.* This, in turn, implies that, until such time as the patent *is issued,* the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." (Emphasis supplied.)

Cohen, supra, pp. 257-259, details the stormy history of allotment taxation, inevitably engendered by the greed of the white man and his envy of the non-taxed Indian allotments.

While I do not doubt for a moment but what it was the same hostility and greed which opened the door to termination of the trust provisions by the enactment of the amendment to the General Allotment Act of May 8, 1906, supra, it is also true that protective language likewise appears in this Act, as follows:

> "*Provided further,* that until the issuance of fee simple patents, all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States."

IV.

The Clapp Amendment

The sorry events leading up to the infamous amendment sponsored by Minnesota's Senator Moses Clapp in 1906 and 1907 are objectively treated by Folwell at pp. 226-296, volume 4, "History of Minnesota". Unfortunately, the earlier trend of emmigration to the White Earth Reservation did not continue, probably due to improvement of hunting, fishing, and wild rice conditions on the Leech Lake and Mille Lacs Reservations. By November 1, 1891, only 400 Indians had removed to White Earth, and even though informed that the option of removal would cease on October 1, 1894, less than 1,000 Indians had moved. A part of the reluctance had to be based upon the unjust reduction in allotments from 160 to 80 acres in 1891, when the Dawes Act was amended. 26 Stat. 794, 1 Kappler 56.

At p. 261, volume 4, Folwell describes "the tragedy of White Earth" as follows:

> "It was the expectation of the Government from the time of the establishment of the White Earth Reservation in 1867, that eventually all the Chippewa of Minnesota would be consolidated there in a rich and beautiful country, where, safe from the white man's whiskey jug, they would become prosperous and orderly

citizens. Their allotted lands were to be free from taxation and inalienable except to members of the Chippewa Tribe. The task, far from pleasant, of relating the failure of this beneficient program is now before us. The virtual destruction of the White Earth Reservation has been effected by means of a series of legislative and administrative acts that have the appearance of a systematic premeditated scheme. This may well be discredited but it remains a fact that there was a logical sequence to them, which has been thought by many to justify such a conjecture. The underlying motive was simply the immemorial greed of the white man for land and for the exploitation of natural resources."

The entrance of Senator Clapp onto the scene resulted in "the Clapp rider of 1904", 33 Stat. 209-210, 3 Kappler 55, which provided that timber on a minor's allotment could be sold by his parents; and this, coupled with the ostensibly favorable provision restoring allotment to 160 acres (33 Stat. 539, 3 Kappler 98) resulted in all allotments being exhausted by April 25, 1905. Clapp, who represented the timber companies (p. 276, Folwell), succeeded in getting the bids for the timber rejected, claiming that it was unfair that the Indians whose allotments contained timber should have an advantage over those who had non-timber allotments. The results, according to Folwell, were the amendments of 1906 and 1907, 34 Stat. 353, 3 Kappler 220; and 34 Stat. 1034, 3 Kappler 285. Folwell calls these "riders", surreptitiously tacked on to appropriation bills. Not one Minnesota Congressional voice was heard in opposition to the scheme (p. 277).

In 1907, when asked about the effect of the removal of restrictions following the first amendment in 1906, Senator Clapp replied, "Mr. President, its success exceeded my most sanguine expectations". 41 Cong. Rec. 2337 (1907). The swindling of both mixed-bloods and full-bloods and

debauchery which followed is detailed by Folwell at pp. 277-283, volume 4.

That the black pages of Minnesota's history exist relative to the White Earth Reservation can hardly be doubted. That the severalty allotment concept has failed is conceded even by Cohen. pp. 258-259. However, that history and that failure impels me to draw two conclusions which seem to be supported by both Congressional intent, as exemplified in the Wheeler-Howard Act of 1934, and the case law dealing with the taxation by states and municipalities of Indian allotment land:

1. The provisions of the Clapp Amendment should be strictly construed so as to avoid whenever possible, forfeiture of Indian allotment lands on the White Earth Reservation for nonpayment of taxes, and

2. To continue, whenever possible, tax exemption of allotments still held by Indian people on the White Earth Reservation until and unless the Indian receives *fair* value in a sale desired by him and supervised by the United States Government.

The rather unbelievable language of the Clapp Amendment in its final form is as follows:

"That all restrictions as to sale, encumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, heretofore or hereafter held by adult mixed-blood Indians are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed-bloods upon application shall be entitled to receive a patent in fee simple for such allotments . . ."

Read literally, all severalty allotments issued to mixed-blood Indians on the White Earth Reservation became sub-

ject to taxation March 1, 1907, or as soon as trust patents were issued thereafter.

The issue becomes: Does Congress have the power to remove all restrictions as to sale, encumbrance or taxation of Indian allotments while such allotment is held under a trust patent?

The resolution of this issue is critical to the case at hand. If the Clapp Amendment is wholly constitutional and viable, Zay Zah could have been taxed on his allotment beginning with the day he received it. If the language of the amendment relating to taxation is unconstitutional, Zay Zah's allotment is still tax exempt, because of the extension language of the Wheeler-Howard Act discussed hereinafter.

That the Clapp Amendment's removal of restrictions on alienation has been held valid cannot be doubted. In *Dickson v. Luck Land Company,* 242 U.S. 371, 37 S.Ct. 167, 61 L.Ed. 371, and in *United States v. Waller,* 243 U.S. 452, 37 S.Ct. 430, 61 L.Ed. 843, both decided in 1917, deeds by mixed-blood Chippewas, pursuant to the Clapp Amendment, were held valid. However, it is noteworthy that in both cases the Indians had voluntarily availed themselves of the power to alienate granted by the amendment. Neither case concerned itself with the issue of an Indian who desires to *continue his allotment* in the trust status under the original grant. The 8th and 10th Circuits have followed the *Waller* and *Dickson* cases in *Johnson v. United States,* 283 Fed. 954 (8th Cir., 1922); and *United States v. Estill,* 62 Fed.2d 620 (10th Cir., 1933). While relied on by plaintiffs, I can find no support whatever in these cases for the proposition that the Clapp Amendment was effective to permit taxation, at least during the period of trust stated in the allotment.

Choate v. Trapp, supra, set forth the standard which has been followed in later cases. In that case, Choctaw and Chickasaw allottees, in part consideration for their relinquishment of all claim to tribal property, received individual allotments. Trust patents were given the allottees, and the land was to be non-taxable for the first 21 years while title remained in the original allottee. Subsequently, on May 27, 1908, Congress passed a general statute removing restrictions on sale, encumbrance and taxation. Oklahoma proceeded to tax the allotments. The Supreme Court of the United States concluded that, although Congress could remove restrictions on alienation, because this was the removal of *a limitation,* it could not remove the tax exemption because "the provision that the land should be nontaxable was a property right which Congress undoubtedly had the power to grant. The right fully vested in the Indians, and was binding upon Oklahoma".

The decision in *Choate* relied on a contract theory, the Indians having received individual allotments in exchange for their claimed tribal property, with the distinct understanding that the allotments would be non-taxable. This contract theory appears in the cases which have followed, holding that an Indian has a vested right of non-taxation which can be divested only through due process.

Cohen, supra, p. 259, points out that beginning in 1917, there was wholesale patenting in fee by the United States Government, whether the allottee desired the patent or not. In 1921, the policy was reversed, *Cohen,* ibid., and a variety of suits followed, seeking to recover taxes paid by the Indians, to enjoin further taxation, and to strike allotments from the tax rolls.

In *United States v. Benewah County, Idaho,* 290 F. 628 (9th Cir., 1923), two Indian allotments under trust patents issued in 1909 were taxed in 1918 to 1920 after fee patents were issued *without application* in 1916. The Court ruled that the taxes were void, stating (p. 631):

> ". . . The right of the Indians to have their allotments held in trust by the United States free from taxation by local authorities for a period of 25 years was a

valuable right. Once vested as it was, it could only be divested by due process of law. The Act of May 8, 1906 . . . should, we think, be held to mean that such action by the Secretary can be had only *upon the application of the allottee or with his consent.*" (Emphasis supplied.)

See also *United States v. Ferry County, Wash.*, 24 F.Supp. 399 (E.D. Wash., 1938) and *United States v. Board of Commissioners*, 6 F.Supp. 401 (W.D. Okla., 1934).

In 1938, the 9th Circuit considered the issue in *United States v. Nez Perce County, Idaho*, 95 F.2d 232. In that case, the Indians received allotments under the General Allotment Act in 1895. Fee simple patents were issued *without application* under the Act of May 8, 1906. Subsequently, the trust period was extended in 1920 and 1930, by Presidential Order. From 1921, until the fee patent was cancelled in 1932, the county attempted to tax the land. The Court ruled the lien of the county for unpaid taxes void, based on the allottee's lack of application for or consent to the fee patent, stating at pp. 235-236:

"The Allotment Act, as well as the trust patent, by plain implication granted the Indian immunity from taxation during the trust period or any extension of it, and he had the right finally to receive his lands 'free of all charge or incumbrance whatsoever.' The authorities are uniform to the effect that this right of exemption is a vested right, as much a part of the grant as the land itself, and the Indian may not be deprived of it by the unwanted issuance to him of a fee patent prior to the end of the trust period. (Citing cases)"

We thus pass to the cases directly construing the Clapp Amendment. Unfortunately, the United States Supreme Court has considered the taxation clause of the Clapp Amendment only once. In *Mahnomen County, Minnesota v. United States*, 319 U.S. 474, 63 S.Ct. 1254, 87 L.Ed. 1527 (1943), the Court ruled that an Indian could, and in this case had, paid taxes *voluntarily*, even though he had not received a fee patent. The trust patent in *Mahnomen County* was issued in 1902 and expired in 1928. No issue of extension of the trust period was raised. Interestingly enough, the Court stresses the need for *consent* on the part of the Indian allottee (p. 477):

"The Clapp Amendment gives the consent of the United States to state taxation, thus removing the barrier to taxation found to exist in *United States v. Rickert*, 188 U.S. 432, 47 L.Ed. 532, 23 S.Ct. 478, supra; but under *Choate v. Trapp*, the Indian, who has gained a '*vested right*' not to be taxed *must also consent.*" (Emphasis supplied.)

Thus, far from supporting plaintiffs' position, *Mahnomen County* seems to me to support defendant Aubid's position that, without his consent, the trust continues, and his land is tax exempt.

The most persuasive case I have found is *Morrow v. United States*, 243 Fed. 854 (8th Cir., 1917), involving Becker County, Minnesota's attempt to tax an allotment held under a 1902 trust patent following passage of the Clapp Amendment. The Indian had never attempted to alienate or encumber the land. The Court concluded that the land could not be taxed, basing its conclusion on a contract theory, namely, that the Nelson Act had resulted in "a binding agreement" between the Government and the Indians. The Court states, at pp. 857-858:

"Thus, the terms of this Act, as well as its attendant circumstances, leave no doubt that this act required, before it should become effective, an agreement to its terms by the Indians and the cession by them of very valuable tracts of lands to which their title was unimpeached. The Indians fully performed their part of the

agreement, and it was in exact performance upon its side that the government allotted to this Indian his land and was holding it for him at the time the Clapp Amendment was enacted. Such a proposal, acceptance, passage of consideration, and performance between private parties would constitute a valid contract. The character of the transaction is not changed because one of the parties to it is the government . . .

"A trust patent in exact compliance with such understanding and agreement was issued this Indian, and under it he has taken and holds this land. His rights are vested and are impervious to alteration against his will except through the sovereign power of eminent domain. One of these rights was freedom from state and local taxation."

The *Morrow* Court carefully distinguished *Dickson* and *Waller,* supra, as involving Indians who had fully availed themselves of the terms of the Clapp Amendment, and secured patents thereunder and had alienated their lands.

United States v. Benewah County, supra; *United States v. Ferry County,* supra; and *Glacier County, Montana v. United States,* 99 F.2d 733 (9th Cir., 1938) answer any contention that there is a distinction when the allotment is issued after, instead of before, the Clapp Amendment. While dealing with the 1906 amendment of the General Allotment Act, rather than the Clapp Amendment, the three courts unhesitatingly ruled that taxes on such allotments were void, even though fee patents had been issued, though without the application or consent of the Indians.

The Minnesota Supreme Court has construed the Clapp Amendment in only two cases. Both involve 1902 trust patents issued to adult mixed-blood Chippewas. *Baker v. McCarthy,* 145 Minn. 167, 176 NW 643, admittedly favorable to the plaintiffs, ruled in 1920 that the Probate Court had jurisdiction to administer the estate of an Indian allot-

tee, and to determine his heirs. The Court reasoned that since the Indian had now received a fee simple title by reason of the amendment, the Indian was by implication emancipated from Federal guardianship and jurisdiction, and his estate, consequently, was within the jurisdiction of the state Probate Court.

The second case, *Warren v. Mahnomen County,* 192 Minn. 464, 257 NW 77, decided in 1938, would appear to have overruled *Baker,* at least by implication. It is certainly much more in point, and specifically follows *Morrow,* supra. The Court ruled that taxes levied during the years 1917 to 1921, while the 25-year trust patent was in existence, were totally void. This was true, even though the Indian had paid up the delinquent taxes. The *Warren* Court held that the payment was not voluntary.

Except for the fact that the 25-year trust period provided for in Zay Zah's allotment expired in 1952, there would be no issue for me to decide, as plaintiffs candidly and admirably concede that the Clapp Amendment's direct language is vitiated on constitutional grounds during the 25-year period. In fact, an earlier tax delinquency proceeding during the 25-year period was cancelled, as set forth in the stipulation of facts agreed to by the parties.

Relying, however, upon *United States v. Spaeth,* 24 F. Supp. 465 (D. Minn. 1938), plaintiffs claim that, even though no fee patent was ever issued or delivered to Zay Zah, and no application for or consent to such a fee patent was ever executed by Zay Zah during his lifetime, the tax exempt status of his allotment disappeared 25 years after its issuance.

That *Spaeth* is good authority for this proposition cannot be doubted. In *Spaeth* the trust patents were dated between 1902 and 1911. While no patents were requested by the Indians, unasked for patents had been issued during the 25-year trust period to all but two Indians. A 1920 Execu-

tive Order extended "the trust or other period of restriction against alienation", but did not refer to taxability. The venerable Judge Nordby concluded that "the Clapp Amendment divested the United States of any title to lands of adult mixed-bloods. . . The lands in question were by reason of that amendment subject to no alienation restrictions. A title tantamount to fee by reason of legislative enactment existed in the allottee."

Judge Nordby apparently relied on the failure to mention "charges and encumbrance" as indicating that the extension order did not intend continued tax exemption.

A second Executive Order of May 5, 1927 was discussed by the Court in *Spaeth,* and Nordby ruled that the order did not apply to mixed-blood Chippewas "because the Clapp Amendment divested the United States of any title to the lands of the adult mixed-bloods".

The basic flaw in Judge Nordby's reasoning is apparrent. If fee title vested immediately on passage of the Clapp Amendment, the land would be subject to *immediate* taxation. However, the Court, nevertheless, ruled that the tax exemption continued until the end of the 25-year trust, just as conceded by the plaintiffs in the case under consideration. By so ruling, the Court's language relative to the inefficacy of the extension orders robs the case of any real authority, especially in view of *Morrow,* not cited nor recognized by Nordby, even though decided by the 8th Circuit. Nordby states at p. 469:

> "The President's order makes no reference to continued immunity from charges and encumbrances. If, therefore, it appears that there was no restriction against alienation as against lands held by the adult White Earth mixed-blood Indians, does it not necessarily follow that the Executive Order did not intend to extend *that which had already terminated?*" (Emphasis supplied.)

The irreconcilability of *Spaeth* and *Morrow,* and the refusal of the *Spaeth* Judge to consider the vested interest contract theory employed by the Supreme Court in *Choate,* leaves me no alternative but to ignore *Spaeth,* rather than to attempt to harmonize it. However, even *Spaeth* conceded that the Clapp Amendment had no effect until the end of the 25-year period, as have the plaintiffs, so we must next consider the effect of the Wheeler-Howard Act of 1934.

V.

Wheeler-Howard Extended the Trust Period Beyond 1952, to the Present Date, and Until Further Act of Congress

While I freely concede that Congress *could* have terminated the non-taxability of Zay Zah's allotment in 1952 by simply repealing the Wheeler-Howard Act, it has not seen fit to do so. In writing a forward to Cohen's well regarded "Handbook of Federal Indian Law (frontispiece XIX), then Secretary of Interior Harold L. Ickes stated as follows:

> "The Wheeler-Howard bill embodies the basic and broad principles of the administration for a new standard of dealing between the Federal Government and its Indian wards.
>
> "It is, in the main, a measure of justice that is long overdue."

The simple, direct, and compelling language of Wheeler-Howard bears quotation:

> "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." (Emphasis supplied.)

There is no room for any assertion that taxability, as well as non-alienability was not carefully considered by

Congress. It should be remembered that the allotment concept had been discarded as being unfavorable to Indian people at the time that Wheeler-Howard was passed. However, it is just as clear that whatever viable scraps of the program had been retained by frugal and wise Indian people should remain unsullied and immune from further predation by whites. I do not mean to imply by such language that Mahnomen, Becker, or Clearwater Counties have themselves anything but an understandable need for tax revenue prompting their tax policies with reference to allotments.

I likewise impugn no ulterior motives to the plaintiffs Stevens in connection with their good faith purchase of Zay Zah's 40-acre tract from the State of Minnesota. However, the consequences are the same as those which took place during the ravaging of the White Earth Reservation following passage of the Clapp Amendment. Zay Zah and his only son would be deprived of the former's allotment without any compensation whatsoever, were plaintiffs to prevail here.

While I am not at all certain that the State of Minnesota and its counties would be able to tax a White Earth allotment, even in the absence of Wheeler-Howard, simply because of the lack of consent on the part of an allottee, and/or the failure of the United States Government to issue and deliver a fee patent to the allottee, I welcome the clear, unambiguous language of Wheelr-Howard as an easy vehicle for sustaining defendant Aubid's position.

VI.

Non-Applicability of Public Law 280 and the Indian Civil Rights Act

While neither side has raised the question, I feel compelled to point out, in view of *Bryan v. Itasca County,* —— Minn. ——, 228 NW2d 249, now on appeal to the Supreme

Court of the United States, that neither 28 U.S.C., Sec. 1360, commonly referred to as Public Law 280, nor 25 U.S.C., Sec. 1322, afford any support for plaintiffs' position.

While Minnesota is, indeed, a Public Law 280 state, and the Indian country comprised in the White Earth Reservation is subject thereto, subparagraph (b) specifically exempts from its provisions "any real . . . property . . . belonging to any Indian . . . that is held in trust by the United States", and the identical provision appears in 25 U.S.C. 1322, with the added requirement appearing in subparagraph (a) that the consent of the tribe is required for any exercise of civil jurisdiction by a state court. c.f. *Nelson v. Dubois,* —— N.D. ——, 232 NW2d 54.

Because I have concluded, in part V that the trust provisions of Zay Zah's trust patent continue to the present date and in the future by reason of the Wheeler-Howard Act, and the failure to issue and deliver a fee patent, both Public Law 280 and the Indian Civil Rights Act are wholly inapplicable.

VII.

Conclusion

The painstaking efforts of both attorneys in this litigation are sincerely appreciated. Since I can well visualize that numerous tracts of land on the White Earth Reservation, now purportedly owned by persons who purchased tax deeds from the State of Minnesota, will be affected by the within decision, I sincerely recommend an immediate appeal of my decision to the Supreme Court of the State of Minnesota. I do so, however, not from any doubt as to the correctness of my decision, but only so that land ownership and anticipated tax revenue in and from the Reservation will be properly corrected.

J.A.S.

APPENDIX C

Report of the Commissioner of Indian Affairs, 1909, p. 130

TABLE 47.—*Schedule showing each Indian reservation, under what agency or school, tribes occupying or belonging to it, area not allotted or specifically reserved, and authority for its establishment*—Continued.

• • •

Name of reservation and tribe

White Earth (Under White Earth School.) Tribes: Chippewa of the Mississippi; Pembina, and Pilager Chippewa.

Area (unallotted).—78,178.

Date of treaty, law, or other authority establishing reserve. Treaty of Mar. 19, 1867, vol. 16, p. 719; executive orders, Mar. 18, 1879, and July 13, 1883; act of Jan. 14, 1889, vol. 25, p. 642. (See agreement July 29, 1889, H. R. Ex. Doc. No. 247, 51st Cong., 1st sess., pp. 34 and 36.) Under act of Jan. 14, 1889 (25 Stat., 642), 402,516.06 acres have been allotted to 4,868 Indians, and 1,899.61 acres reserved for agency, school, and religious purposes, and under act of Apr. 28, 1904 (33 Stat., 539), 223,928.91 acres have been allotted to 2,794 Mississippi and Otter Tail Pillager Chippewa, being additional allotments to a part of the allottees under act of Jan. 14, 1889, leaving unallotted and unreserved 78,178.19 acres. Lands now in process of allotment under both acts.

• • •

Report of the Commissioner of Indian Affairs, 1910, pp. 53-54

THE WHITE EARTH SITUATION.

A situation of extreme seriousness was discovered at the White Earth Reservation in Minnesota during the year. It is the old story of the robbery of Indian lands and the dirty

work that goes with it. The fraud began in connection with the sale of the lands of the mixed-blood adults on the reservation. This sale was authorized by act of Congress June 21, 1906 (34 Stat., 325-353), which removed all restrictions against the sale, encumbrance, or taxation of allotments within the White Earth Reservation held by adult mixed-blood Indians. The act also declared that the trust deeds executed by the department for such allotments passed the title in fee simple.

The allottees began to sell their lands as soon as the act was passed. The cupidity of the white purchasers led to flagrant violations of the law. They purchased lands of Indians who were unquestionably full-bloods and plainly not competent to sell their lands under the law. Trickery and fraud of all kinds was resorted to, and finally about 95 per cent of the allotments, or the timber on the allotments, of White Earth allottees had been disposed of under the pretended authority of the law mentioned. Millions of dollars were involved in these illegal sales.

An investigation by representatives of the department was made early in the present fiscal year, and as a result thoroughgoing measures have been set on foot to get back the stolen lands as soon as possible. An employee of the office has been specially assigned to the preparation of the legal cases that will be necessary, and special United States attorneys have been assigned by the Department of Justice to recover the lands and value of the timber purchased from full-blood Indians, full-blood minors, and mixed-blood minors.

This work is being pushed with all possible energy, although progress is necessarily somewhat slow on account of the many legal difficulties in the way.

• • •

National Archives Record Group No. 75, Field Records of White Earth Agency Letter from S. G. Iverson, State Auditor of Minnesota to Simon Michelet, Indian Agent, February 26, 1907

STATE OF MINNESOTA

STATE AUDITOR'S OFFICE

ST. PAUL

Feb. 26, 1907

Mr. Simon Michelet, U.S. Indian Agent
White Earth, Minnesota.

Dear Sir:

On page 31 of the General Appropriation Bill for the Indian Department, approved June 21, 1906, "All restrictions as to sale, incumbrance or *taxation* for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed blood Indians are hereby removed."

From the above language it appears that all allotments of Mixed blood Indians on the White Earth Reservation are now subject to taxation. When my attention was called to this matter, I at once wrote to the Department of Interior and asked for a list of the allotments of mixed bloods. I was informed that the records there did not disclose whether they were mixed or full bloods. I therefore decided to obtain a complete list of all allotments depending upon information to be obtained in the future to separate the mixed blood from the full bloods. Yesterday the list was received here. Now, the question arises how are we to determine which belong to the mixed bloods. Of course, if we cannot obtain that information I shall be compelled to certify the entire list for taxation and it will then be a matter for future adjustment to eliminate all tracts alloted to full bloods. I should prefer not to do this as it will complicate matters and titles for some years to come. I therefore write to you to ask for such suggestions as you feel inclined to

give. It being settled by the Act of Congress that these mixed blood allotments are taxation. The question is how can we separate them from the others. I merely presume that you have the information. The question too is, is it accessible and would it be entirely practicable for you to assist us in this matter. Should it be necessary, should be glad to send somebody there to spend a day or two to go over the list to arrive at some adjustment.

Hoping to have your active cooperation and assistance,
I am,

Very truly yours,
/s/ S. G. IVERSON
State Auditor

National Archives File No. 23059-09-313, Letter from J. R. Howard, Superintendent and Special Disbursing Agent of White Earth Agency to Commissioner of Indian Affairs, March 23, 1909

DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,
WHITE EARTH AGENCY, MINN.

March 23, 1909.

The Honorable Commissioner of Indian Affairs,
Washington, D. C.

Sir:

In response to your office letter dated March 13th, 1909-15419-1909-16003, TBW, I have the honor to transmit herewith a roll of the names and allotments of all adult mixed-bloods whose lands are included in the lists of lands advertised for sale under tax proceeding for the year 1907 in the counties of Mahnomen and Becker.

I have indicated by check mark on the left hand side of the roll those who to best of my judgment are unable to pay these taxes.

I have forwarded a copy of these lists to the clerk of the District Court of Mahnomen and Becker counties with a protest against the sale of any other allotments as directed by you. I have also forwarded to the U. S. District Attorney a list of the names and description of allotments of all minors and full-bloods whose allotments are contained in these tax lists, and he informs me it is his purpose to file a bill in equity to restrain the sale of these allotments in these proceedings.

Your respectfully,
/s/ JOHN R. HOWARD
Supt. & Spl. Disb. Agt.

National Archives, Memorandum from John Francis, Jr. to Accounts Division, March 29, 1909

MEMORANDUM

Accounts Division:

The enclosed list shows the adult mixed-blood Indians belonging to the White Earth Reservation In Minnesota who are charged with delinquent taxes for the year 1907 in the amounts shown opposite each name.

The Act of March 1, 1907 (34 Stat. L, 1016), provides that where the restrictions as to alienation have been removed with respect to any Indian allottee or as to any portion of the lands of any Indian allottee, and such allottee as an individual or as a member of any tribe, has an interest in any fund held by the United States beyond the amount by law chargeable to such Indian or tribe on account of advances, the Commissioner is authorized to pay the Indian's taxes and charge the amount thereof to such allottee, but it is provided that no such payment shall be made where it is in excess of the amount which will ultimately be due said allottee.

The green check to the left of the names indicates the Indians who in the judgment of the Superintendent are unable to pay their taxes. Please advise whether there are any funds to the credit of these Indians available for the purpose of paying the taxes.

/s/ JOHN FRANCIS, JR.
Acting Chief Land Division.

National Archives File No. 24562-09-302. Letter from C. E. Richardson, Attorney for the White Earth Bands to Commissioner of Indian Affairs, March 29, 1909

March 29, 1909.

Honorable Commissioner,
Office of Indian Affairs,

Dear Sir;

In the matter of the illegal assessment of taxes against Indian allotments by the State of Minnesota, I take pleasure in saying that I believe it will be amicably and equitably adjusted by the Legislature of Minnesota in the enactment of a law which reads practically as follows:

> That no allotment of land within this State, made to an Indian, shall be assessed for taxation unless and until a patent in fee simple therefor shall have been issued by the United States to the allottee, or until the allottee shall have alienated such allotment by a deed of conveyance. And any levy or assessment of taxes heretofore made contrary to the provision of this act are hereby declared void; as to such void taxes, the proper county and state officers are hereby authorized and directed to cancel the same.

Thinking that some such provision might be secured, I hurriedly left Washington for Saint Paul, where I consulted with the State Auditor, Attorney General, Governor and Tax Commissioners, who welcomed this as the best solution of the difficulty, and the bill (S.F.694) passed the Minnesota Senate under suspension of the rules. I am assured by people in the House, who have authority to speak, that the bill will soon become a law.

While the U.S. District Attorney stands ready to bring suits to enjoin the county officers from illegally taxing Indian allotments, he welcomed the foregoing as a preferable course, and cooperated with me so far as possible, and will

act under his instructions from the Department of Justice only as a last resort.

It is needless to say that the method devised to draw a line between Indians taxable and nontaxable meets with the hearty approval of my clients the Indians, so far as I can learn. It is impossible to secure accurate information as to who are the Mixedbloods whose restrictions are removed and whose trust patents have become equivalent to fee patents, but as most of the latter have been issued patents in fee (as well as some Fullbloods under the Burke Act) it was thot fair and equitable to the State and to the Indians to pass a law that would make *the fee patent* the evidence of the allottee's status.

Having succeeded thus far, I attempted to secure for the owners of these taxable lands some concession which would relieve them from the payment of interest, costs and penalties, so, jointly with Hon. John R. Howard, Supt. at White Earth, I sent the inclosed petition to the county auditor of each of the countries in which the White Earth Reservation lies, for transmittal and recommendation to the Tax Commission of Minnesota. The latter seem disposed to favor it, and I think that when the Department pays the taxes for these people it will be only necessary to pay the bare, original tax, without the interest, costs and penalties which have accrued and increased the liability very materially.

Yours very respectfully,

/s/ C. E. Richardson
Atty. for White Earth Bands.

National Archives File No. 15419-09-302. Letter from John Francis, Jr. to C. E. Richardson, Attorney for the White Earth Bands, April 1, 1909

C. E. Richardson, Esq.,
Attorney for White Earth Bands of Chippewa Indians,
500 Hibbs Building,
Washington, D.C.

Sir:

The Office is in receipt of your letters dated February 24, 1909, February 27, 1909, and March 8, 1909, regarding the payment of taxes on the lands of the White Earth Band of Chippewa Indians in Minnesota, under the Act of March 1, 1907 (34 Stat. L., 1016).

In response you are informed that the Superintendent of the White Earth Indian School has sent this Office a roll of the names, with the allotments to adult mixed bloods, whose lands are included in the lists of lands advertised for sale by the officials of Mahnomen and Becker counties, Minnesota. He has also sent a copy of the same list to the clerks of the District Court of Mahnomen and Becker counties, together with a protest against the sale of any other allotments, as directed by this Office.

The Attorney General has instructed the United States Attorney for the District of Minnesota to institute proceedings to enjoin the sale for taxes of all allotments belonging to minor mixed blood and full blood Indians on the White Earth Reservation, and the superintendent of the White Earth Indian school has been directed by the Office to render all possible assistance in protecting the rights of these Indians.

Very respectfully,

(*Signed*) JOHN FRANCIS, JR.,
John Francis, Jr.,
Acting Chief Clerk.

National Archives File No. 25674-09-302. Letter from Acting Commissioner of Indian Affairs from Superintendent of the White Earth Indian School

The Superintendent,
White Earth Indian School,
White Earth, Minn.

Sir:

Authority is hereby granted you to expend the sum of $127.12, or as much thereof as may be necessary, during the current fiscal year, in the payment of delinquent taxes, for the year 1907, of the following adult mixed-blood Indians belonging to your reservation:—

O-3231. Julia Grant. Allotment, west half S.E., T.144, R.42, sec. 22, $10.13. (Died February, 1898).

O-1967. Sang-way-way-gah-bow-e-quay. Lots 4 and 5, T.142, R.37, sec. 4, $16.46. (Died, 1907).

O-2044. Wah-we-yay-ge-shig. Lots 3 and 4, T.145, R.38, sec. 1, $13.55. (Died October 2, 1905).

O-1990. Mah-coh-day-aun-oh-quod. This is the allotment of Ah-be-je-shig-o-quay. West half of N.E., T.142, R.38, sec. 10, $22.45.

O-1987. Ke-zhe-cum-ing-o-quay. This is the allotment of Mah-cah-day-aun-ah-quod, who died September, 1896. Lot 2, N.W. of S.E., T. 142, R.38, sec. 10, $22.03.

O-1991. Mah-Coh-day-aun-oh-quod. This is the allotment of Say-say-gwen-o-quay, who died August, 1894. N.E. of N.E., T.142, R.38, sec. 10, allotment 1. $21.19.

O-632. John K. Fairbanks (John H. Fairbanks). South half of S.E., T.145, R.41, sec. 3, $11.17. (Died Oct. 5, 1902.)

O-2415. Francis Leader. North half of N.E., T.146, R. 41, sec. 21, $10.14.

The restrictions as to alienation, in the foregoing, have been removed.

This action is taken in accordance with your request of March 23, 1909. Payment therefor is to be made from "Chippewas in Minnesota Fund".

Very respectfully,

Acting Commissioner.

National Archives File No. 27691-09-302. Letter from C. F. Hauke, Chief Clerk to A. L. Thompson, June 17, 1909

A. L. Thompson, Esq.,
Cashier Security State Bank,
Mahnomen, Minnesota.

Sir:

Referring to your letter dated April 8, 1909, concerning the payment of taxes on the allotment of Mrs. Lizzie Loutrelle LeClaire, a mixed-blood Indian of the White Earth Reservation, you are informed that after investigation the Office believes that Mrs. LeClaire is well able to pay her taxes, and that it is not deemed advisable to pay them for her and charge against her share of the tribal trust fund.

Very respectfully,

(*Signed*) C. F. Hauke,
C. F. Hauke,
Chief Clerk.

National Archives File No. 32084-11-302.
Letter from C. F. Hauke to J. H. Lonestar, April 19, 1911

Mr. J. H. Lonestar,
Shell Lake, Wisconsin.

Sir:

Your letter of April 8, 1911, asking whether the Board of County Commissioners have the right to collect taxes on Indian land in the White Earth Reservation, has been received. You mention specifically the case of the purchase by you of land from a person who you say is a mixed-blood Indian.

The Act of June 21, 1906 (34 Stat. L., 325, 353), removed the restrictions from the lands of all adult mixed-blood Indians of the White Earth Reservation. Such lands thereafter became taxable by the State authorities the same as the lands of any other citizen or resident of the State of Minnesota. If the land which you have in mind unquestionably belongs to a mixed-blood Indian, the restrictions have been removed and the land is taxable. The Office suggests that you communicate with Mr. John R. Howard, Superintendent of the White Earth Indian School, White Earth, Minnesota, giving him the name of the Indian, and ask whether the Indian is regarded as a full-blood or a mixed-blood.

Respectfully,

(*Signed*) C. F. HAUKE,
C. F. Hauke,
Second Assistant Commissioner.

National Archives File No. 69242-12-302. Letter from F. H. Abbott, Assistant Commissioner of Indian Affairs to the Honorable H. Steenerson, House of Representatives. July 17, 1912

Hon. H. Steenerson,
House of Representatives.

Sir:

I have the honor to acknowledge receipt of your communication dated July 7, 1912, transmitting letters of July 18 and 29 from Mrs. Susan Porter, who says she is a ¾ blood allottee of the White Earth Reservation and desires to know if she must pay taxes on her land.

It appears that if Mrs. Porter is a ¾ blood Indian her land is subject to taxation the same as that of any other citizen of the State of Minnesota, in accordance with the provisions of the act of June 21, 1906 (4 Stat. L., 325, 353), which provides:

> That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota now or hereafter held by adult mixed blood Indians are hereby removed • • •.

Mrs. Porter's letters are returned.

Respectfully,

(Signed) F. H. Abbott.
/s/ F. H. ABBOTT
Assistant Commissioner

National Archives File No. 57282-13-302.
Letter from C. F. Hauke to Josie Kelley, May 19, 1913

Miss Josie Kelley,
Duane, Minnesota.

(Through Supt., White Earth School.)

Madam:

The Office has received your letter of May 3, inquiring whether your allotments on the White Earth Reservation are subject to taxation by the State and County authorities.

In response you are advised that the Act of June 21, 1904 (34 Stat. 353) provides in part:

> "That all restrictions as to sale, incumbrance or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments . . ."

By virtue of this provision of law the allotted lands of adult mixed blood Indians of the White Earth Reservation become subject to taxation. The printed schedule showing the degree of Indian blood of certain persons holding allotted lands on the White Earth Reservation in Minnesota, approved by the Secretary of the Interior on December 31, 1910, (page 27) shows you to be a half blooded Indian.

What constitutes a mixed blood Indian under the law in question is now before the Federal Court for decision and the Office cannot advise you definitely in regard to the correct interpretation of this law until a final decision has been rendered in regard thereto.

In view of the fact, however, that you are enrolled as a half blood, it would appear that your allotments are subject to taxation by the State and County authorities.

Respectfully,

/s/ C. F. Hauke
Second Assistant Commissioner.

National Archives File No. 20005-18-302. Letter from B. P. Six. Chief Clerk of White Earth Agency to Commissioner of Indian Affairs, February 28, 1919

DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN SERVICE

The Commissioner of Indian Affairs,
Washington, D.C.

Sir:—

I have the honor to acknowledge receipt of Office letter of February 11, 1919 inclosing a letter from Mr. E. P. Wakefield of Waubun, Minnesota, addressed to Hon. Frank B. Kellogg, in which Mr. Wakefield expresses a desire to secure the funds on deposit to the credit of his minor children at this Agency for the purpose of paying delinquent taxes on their home.

In this connection attention is invited to the Office letter on March 15, 1918, Ed-Ind, 20005-18 and the reply from this Agency dated March 23, 1918 relative to this same matter. The Agency letter gave the amount of money to the credit of each of Mr. Wakefields three children and stated that the amount of taxes due on the West 733 feet of the N/2 of SE/4 of Sec. 25, Twp. 143, Range 42 for the years 1913 to 1917 inclusive, together with interest and penalties amount to $313.73. The property above described belongs to Ida Wakefield, the daughter of Ed Wakefield and it is on this property that the family home is located.

In order to save this home from becoming the absolute property of the State of Minnesota, this Agency recommended on August 13, 1917 that the Superintendent be authorized to use the funds belonging to Mr. Wakefield's minor children to pay the delinquent taxes and to take an assignment of the rights of the State of Minnesota to the three minor children of Mr. Wakefield. Under date of April 10, 1918, Ed-Ind. 27865-18, the Indian Office granted au-

thority to use the funds belonging to Clara and William E. Wakefield to take an assignment of the tax title held by the State of Minnesota, on this property, or in other words to subrogate the rights of the State of Minnesota to the three children above mentioned.

Acting in accordance with this authority, Superintendent Hinton, on May 8, 1918 forwarded to the County Auditor of Mahnomen County, Mr. Frank E. Johnson, Check No. 232, drawn against account number 14041 of Clara Wakefield in the sum of $108.40, and check number 238 drawn against account number 14042 of William E. Wakefield in the sum of $134.92 or a total of $243.32 in payment for the 1913, 14 and 15 taxes, penalties and interest on the property above described with a request that the Auditor make an assignment of the Tax title for those years, now held by the State to said children.

The balance that remained over after paying the taxes for the years 1913, 14 and 15 was to be applied on the 1916 taxes on the property, with the understanding that Mr. Wakefield was ready and willing to pay the balance of the 1916 and 1917 taxes, penalties and interest on this property, for which he was to receive an assignment of the tax title for the year 1916 only.

From the foregoing it will be seen that Mr. Wakefield's statement that the tax receipts should be delivered to Superintendent Hinton creates a false impression; for the tax titles are to be taken in the names of the children and not in the name of the Superintendent.

The entire balance to the credit of Ruth Wakefield was paid to her on February 11, 1918 upon her becoming of age. The balances to the credit of Clara Wakefield and William E. Wakefield were expended on May 8, 1918 in the manner above set forth. There is, therefore, no funds on deposit at this Agency to the credit of Mr. Wakefield's children. It is true that he has been appointed Legal Guardian

for his minor children, Clara and William E. Wakefield. This appointment as guardian, however, was made subsequent to the date of the closing of their accounts at this Agency.

Very respectfully,

/s/ B. P. Six
Chief Clerk in Charge.

National Archives File No. 45603-20-302.
Letter from C. F. Hauke to Mike Basswood. October 29, 1920

Mike Basswood (Me-zha-gwon-e-ge shig),
Ponsford,

Minnesota.

My Friend:

The Office has read your letter of October 2nd, in which you say you may be deprived of your land and the land of your deceased child; also you ask whether every Indian there is a mixed-blood.

The Superintendent at White Earth has been asked to investigate your case and to report whether there is any effort being made to deprive you of your property, and to advise and assist you in case you need his help.

It would be impossible to say whether every Indian at Ponsford was a mixed-blood until the Office knows just what Indians reside there. It is probable however, that there are both full and mixed-blood Indians there, as well as in other places.

Indians who are full-bloods need have no fear of losing their property as they cannot sell without the approval of the Secretary of the Interior and it cannot be taken away from them while it is held in trust by the United States. The property of mixed-bloods who have received patents in fee is the same of the property of any white person; it may be taxed and it is liable for just debts contracted by the owner. If the mixed-blood has not had a patent in fee, but holds it in fee under the Act of Congress of 1906 which gave adult mixed-bloods fee title, the land is not taxable until 25 years from the date of the trust patent. It may, however, be sold or taken for debt.

Your friend,
/s/ C. F. Hauke
Chief Clerk.

APPENDIX D

40 Cong. Rec. 3465, March 7, 1906

Mr. Burke of South Dakota:

Up to last April whenever a person was convicted of selling liquor to an Indian it was never considered that there was a distinction as between an Indian who had taken his allotment and an Indian commonly known as a "reservation Indian." The Supreme Court, in a case entitled "The matter of Heff," held that where an Indian had taken his allotment under section 6 of the Indian allotment law he is a citizen of the State or Territory within which he resided, and that he is no longer subject to the jurisdiction of the United States. The effect of that decision has been most demoralizing among the Indians. Liquor is now sold to Indians almost as openly as to white men, and because of that fact largely *I introduced at the earlier part of this session a bill which provides for an amendment to section 6 of the Indian allotment law, so that hereafter, when lands are allotted to Indians, citizenship is to be withheld until they receive their fee-simple patent. In other words, during the period of time that the Government elects to withhold the title to the land citizenship is also to be withheld and the United States will continue to exercise jurisdiction over such Indian.* I speak of this because I expect to ask unanimous consent of this House within a very few days to have that bill passed. In the measure there is a provision giving to the Secretary of the Interior authority, in his discretion, whenever he believes an Indian has reached the stage of advancement and civilization where he is capable of managing his own affairs, to issue to such Indian a fee-simple patent, and with that will go full citizenship. (Emphasis added).

This bill now before the committee is filled with provisions authorizing the Secretary of the Interior to convey to Indians their allotments and relieve them from the trust features. The committee, in incorporating these provisions

in the appropriation bill, followed in every instance the recommendation of the Secretary of the Interior. Our theory is that the Secretary of the Interior and the Indian Department is the Department of the Government that knows what is for the best interests of the Indian; that knows when he has reached a stage capable of managing his own affairs; and, therefore, when it recommends that an Indian be given a fee simple patent for his allotment we put it in the Indian appropriation bill—and I may say that it is subject to a point of order—and in this respect the progress, advancement, and the best interests of the Indian may be very seriously hampered and interfered with unless we have a law such as I have proposed, and such as has been recommended by the Committee on Indian Affairs. It has the very strong recommendation of the Commissioner and it is approved by the Secretary of the Interior. I hope that I may be recognized at some near date to call up the bill for consideration, and I trust that every Member of the House will see the necessity and importance for the enactment of such a measure.

40 Cong. Rec. 5790-5791, April 24, 1906

PROPOSED AMENDMENT TO THE INDIAN APPROPRIATIONS ACT OF 1906

All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita Indians affiliating with said Kickapoo Indians non-resident in the United States, who have been allotted land in Oklahoma are hereby removed: *Provided.* That any such Indian allottee in Oklahoma who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years: *Provided further.* That the patent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said minor as

herein provided, except that no such lease shall extend beyond the minority of said allottee.

• • •

THE SECRETARY. After the word "removed," in line 13, page 104, strike out the colon and insert a period, and strike out the remainder of the paragraph.

Mr. MCCUMBER. Mr. President, I shall have to object to that amendment to the amendment for reasons that appear plain to me. A number of these Indians are going over to Mexico. We do not always know exactly what influence is being brought to bear upon them in order to gain their consent to change their domicile. It is not always easy to ascertain whether or not an absence of a month or two months or six months or even a year amounts to a change of residence. No time is given, and it seems to me that it will be better to allow this restriction to remain until we become certain that the Indian has changed his residence. I greatly fear that the mere absence of an Indian will be taken as a basis for some designing person who wants his land to secure a deed. I hope the provisos will remain in the bill until we can give it further consideration.

• • •

Mr. LODGE. Along the line which the Senator from North Dakota is speaking, there is no provision here for the issuance of patents in fee simple, and the point is made in a note I got from the Department.

• • •

Mr. LODGE. Then they would fall into the hands of the very adventurers and speculators the Senator from North Dakota was speaking about, because they would be the only ones who would know the right Indian, and other people would feel that it would be impossible to get the right or proper title. The Commissioner says:

> So, practically, only parties to the scheme would be able to procure a deed from the right Indian.

It seems to me something would be needed to protect them further.

• • •

Mr. CLAPP. In regard to this matter of patent, I have had it brought up here two or three times in this bill where we remove restrictions. There is no objection to it, nor is there any earthly use in it. These Indians have already a deed called the "trust deed." We convert that into a patent by removing the restriction, and it is purely surplusage to provide for an additional patent when we remove all the restrictions that are contained in the existing instrument. There is no objection to putting it in if anybody desires it.